

BALANCING NATIONAL SECURITY AND THE CONSTITUTION: THE SECURITY
BLANKET OVER CIVIL LIBERTIES

by
Kristian Joseph Hill

A thesis submitted to Johns Hopkins University in conformity with the requirements for the
degree of Masters of Arts

Baltimore, Maryland
May 2020

© 2020 Kristian Hill
All Rights Reserved

Abstract

In a letter from Benjamin Franklin to the Pennsylvania General Assembly in 1775, Franklin wrote, “those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.”¹ While Franklin was addressing his concern with state taxation, his quote touches upon a broader issue that has plagued the country since the days of the founding fathers. This issue is the debate between balancing the government’s actions in national security and the subsequent suppression of certain civil liberties as a result of their actions. Scholars in the field of national defense and or Constitutional law have debated the government’s actions through historical and contemporary examples as right vs. wrong with regards to legality, morality, and ethicality. My thesis analyses these events and scholarly opinions while expanding upon this debate by adding a unique perspective as I look at historical and contemporary examples through a subjective lens of necessity. The objective of my thesis is to review statutes, Presidential actions and Court decisions to show how these institutions have attempted to balance civil liberties and national security. Each of these reviews is a chapter showing that, in general, priority is given to security. My thesis further expands upon this discussion by selecting critical national security events and applying a self-created necessary scale predicated upon three subjective variables that I believe are the crux of national security decision making: the severity of the threat to the country, the imminence of the threat, and the ability to counter the threat to each event. Taking much inspiration from Justice Robert Jackson’s three pronged test in the *Youngstown v. Sawyer* Supreme Court Case, the goal of the scale is to apply my own quantitative analysis to assess the government’s actions and the effects on the American citizens. While this scale is subjective in nature, it is meant to bring a different

¹ Eugene Volokh, “Liberty, Safety, and Benjamin Franklin,” *The Washington Post*, November 11, 2014, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/11/liberty-safety-and-benjamin-franklin/>

approach to the discussion. Through these means, I argue that balance between security and liberty is critical, however, this analysis finds that on balance the institutions of the United States side on the security of the nation over particular individual civil liberties.

Primary Reader and Advisor: Dr. Benjamin Ginsberg

Secondary Reader: Dr. Kathy Hill

Table of Contents

Abstract.....	ii
List of Tables	vii
List of Figures.....	viii
Chapter 1. Introduction	1
1.1. Background of Study.....	1
1.2. Research Problem.....	2
1.3. General Research Objective	3
1.3.1. Specific Objectives	3
1.4. Research Question	4
1.5. Value of Study	4
Chapter 2. Research Methodology	5
2.1. Method of Data Collection	5
2.2. Sampling Design.....	6
2.3. Data Analysis	6
2.3.1. “Necessary” Scale	7
2.3.2. Necessary Scale Quantities Analysis	8
2.4. Summary	9
Chapter 3. Literature on National Security and Civil Freedoms	10
3.1. Prioritization of National Security	10

Chapter 4. Review of National Defense Supreme Court Cases	20
4.1. Suspension of Habeas Corpus (1861)	20
4.2. U.S. Patriot Act (2001).....	23
4.3. Youngstown Sheet & Tube Case (1952)	24
4.4. Guantanamo Military Commissions (2006)	29
4.5. U.S. Patriot Act (2001).....	29
4.6. Ziglar v. Abbasi (2017)	30
4.7. Terry v. Ohio (1968)	32
4.8. D.C. v. Heller (2008).....	33
4.9. Doe v. Chiquita Brands International	35
Chapter 5. Analysis and Interpretation Techniques of the Study Findings	37
5.1. Effect of Strict Scrutiny of National Security Law on Civil Rights.....	37
5.2. Development of Necessity Scale	40
Chapter 6. Analysis on Necessity	42
6.1. Suspension of Habeas Corpus (1861)	42
6.2. Espionage and Sedition Acts (1917)	45
6.3. Japanese Internment Camps (1945).....	47
6.4. Youngstown Sheet & Tube Case (1952)	50
6.5. U.S. Patriot Act (2001)	52
6.6. Detention of Yaser Hamdi (2004)	55

6.7. Killing of Anwar al-Awlaki (2011)	58
6.8. Questioning of the Boston Bomber (2014)	60
6.9. U.S. Travel Ban (2019)	63
6.10. COVID-19 Government Restrictions (2020)	65
Chapter 7. Presidential Review	69
7.1. Recent Executive Orders	69
7.2. G.W. Bush Era	70
7.3. B.H. Obama Era	73
7.4. D.J. Trump Era	77
7.5. Conclusion	80
Chapter 8. Conclusions and Recommendations	82
8.1. Conclusions	82
8.2. Recommendations	82
Bibliography	84
Biographical Statement	92

List of Tables

Table 1. Strict Scrutiny and its Correlations to the Citizens' Rights Infringement	37
Table 2. Strict Scrutiny by Government Institutions in the U.S.	38
Table 3. "Necessary" Weighted Scores by Event.....	40

List of Figures

Figure 1. “Necessary” Scored Graphed.....	41
---	----

1.0 Introduction

1.1 Background of Study

While not said outright, the framers gave the federal government the distinct duty to secure America and her citizens by outlining the national security duties and responsibilities of the government in the Constitution. Within this construct, the U.S. government has an inherent right to take actions that preserve the security of the country as stated by Alexander Hamilton in the Federalist Papers No. 8: “safety from external danger is the most powerful director of national conduct.”² As important as the security of the nation was to the framers, of the utmost priority was the establishment and preservation of civil liberties for the American people. The balancing act between national security and civil liberties is one that has tipped from one side of the pendulum to the other from the very beginning of America. Thomas Jefferson once said, “I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it.”³ Essentially, through Jefferson’s lens, the inconveniences that come inherent with giving equal freedom for everyone outweigh the simplicity that would come from stifling some freedoms. This begs the question: do we slide and keep the scale in favor of civil liberties, accepting the “inconveniences” that would come with more relaxed national security measures? Or do swing the pendulum the other way and pull the security blanket over America, adhering to the philosophy that the lives of millions outweigh the freedoms of one?

One of the qualities that separate the government of the United States from other governments around the world is that the U.S. government provides her people transparency when confining social liberty in times of outrageous risk or war. In that capacity, serious debates have

² Alexander Hamilton, Federalist No. 8, in the Federalist Papers, ed. Clinton Rossiter, New York: New American Library, 1691.

³ Thomas Jefferson, Letter to Archibald Stuart, December 23, 1791.

emerged, drawing differing conclusions regarding the immediate steps that should be adopted in times of security emergencies. While emphasis has been drawn towards vindicating national security, a number of legislations passed have heavily contravened civil freedoms.

The balance between civil liberty and security is a fine act to balance. Examining executive actions, Supreme Court cases, verbiage from the Constitution, and other sources, this thesis expands upon the debate on where the scale should tip in the prioritization of security over civil liberties, or vise a versa. Furthermore, this thesis looks at historical and contemporary national security events that changed the nation and their outcomes through the lens of necessary government action rather than right vs. wrong government action. Through a self-created scale predicated upon three variables: the severity of the threat to the country; the imminence of the threat; and the ability to counter the threat, this thesis will apply some type of quantitative standard to assess the government's actions and the effects on the American citizens, each one of the events chosen is analyzed on whether the actions to preserve the security of the nation outweighed the civil liberties that would be stifled under those actions. I argue that balance between security and liberty is critical however, when forced to choose one or the other, the security of the nation outweighs certain civil liberties.

1.2 Research Problem

Ronczkowski explained that one of the most common approaches applied by the government is to be proactive in an attempt to prevent threats to nation entirely.⁴ However, in this approach, on occasion, security affairs infringe on citizens' fundamental rights and liberties. The current research focuses on the identification, exploration, and analysis of vital important events

⁴ Ronczkowski, M. R. Terrorism and organized hate crime: Intelligence gathering, analysis and investigations. Boca Raton, FL: CRC press, 2017.

that contributed to the topic of liberty concerns in the implementation of national security policies, and how the government has influenced the current state of events. Through these means, this thesis will attempt to answer these the research question: do we tip the scale in favor of civil liberties, accepting the “inconveniences” that would come with more relaxed national security standards? Or do swing the pendulum the other way and pull the security blanket over America, adhering to the philosophy that the lives of millions outweigh the freedoms of one?

1.3 General Research Objective

In general, this thesis seeks to explore how strict vs. loose constructionism, contemporary executive review, Constitutional interpretation, and a review on the necessity of the government’s actions contribute to the idea that liberty is critical however, when forced to choose one or the other, the security of the nation outweighs certain civil liberties.

1.3.1. Specific Objectives

The specific objectives of the current study are to first, identify events and times when the government tipped the scale in favor of security over liberty or vis-versa. Second, examine how certain contemporary events and review how the current and previous two Presidential administrations tipped the scale from one side to the other through their influence of Presidential powers on national security law execution in the United States. Third, review Supreme Court Cases where Constitutional interpretation was applied to generally tip the scale in favor of national security. Finally, review whether the actions of the government to favor national security were necessary by applying a loosely objective scale to some of the most important national security events in American history.

1.4. Research Questions

The current study was guided by the following research questions: How did historical and contemporary security legislations contribute to infringement of civil liberties in the United States? How do Presidential powers influence implementation of security legislations in the United States? How does the Constitution influence enforcement of national security legislations in the United States?

1.5 Value of the Study

The findings of this study will provide further analysis on the difficult question of where the pendulum of security and freedom should rest. While “in the middle” is the most ideal answer, the research provided will demonstrate how the scale, more often than not, in the face of extreme adversity favors security over individual freedoms. The value of this study today with the COVID-19 pandemic restrictions is critical in analyzing the steps the government as many continue to debate reasonable in relation to purpose on this topic.

2.0 Research Methodology

This section describes the methodology used to conduct the current study, including explanation of the techniques utilized by the researcher to collect the required data. Aspects covered include research design, instruments of collecting data, and the methods employed.

This study adopted an exploratory research design; hence, primary sources of data were utilized to provide the information required to complete the investigation. Related existing literature sources were utilized to describe the objectives of the study. The researcher primarily collected data from previous studies that attempted to describe the establishment of US national security legislation and its impact on civil rights as stipulated in the Constitution. Exploratory research was preferred, as it enabled the researcher to gain deeper knowledge on security legislations and their impact on civil liberties. Additionally, this method was most applicable in responding to research questions, for they were based on constructs, unlike hypothesis testing. The exploratory research design, it was therefore justified to apply an exploratory research design in the critical evaluation of the objectives this study.

2.1 Method of Data Collection

Secondary data for the study was collected from eBooks, published journals, and government websites. All the sources were reliable, valid, and up to date, thereby ensuring the overall reliability of the study. The study utilized secondary data that provided an opportunity for the researcher to critically explore the topic without necessarily visiting the field. According to Boyd and Mitchell Jr., the majority of secondary sources are vastly shared for public use, therefore, require the researcher to draw large sample sizes and data collection mythology for the researcher to draw conclusions on the study; this would otherwise have been difficult and impractical for

purposes of this research.⁵ This method can be used as a benchmark from which future researchers can identify research gaps on the topic for further analysis.

2.2 Sampling Design

To conduct this study, the researcher applied purposive sampling. A purposive sample easily predicts a non-probabilistic sample, based on the characteristics of the phenomenon under investigation in the study.⁶ This method facilitated assessment of existing articles, which effectively addressed the theory of declinism and hegemony regarding the US, as well additional sources that examined security legislations in the US and consequences of the laws on civil rights.

2.3 Data Analysis

The researcher adopted a narrative data analysis approach, which allowed for drawing of conclusions on the study topic, based on experiences and findings from existing written literature from previous researchers. Narrative data analysis was utilized, as it allowed the researcher to establish similar themes drawn from the available literature in response to the research questions. The research utilized government publications, peer-reviewed articles, and technical documents.⁷ Reliance on secondary data enabled the study to critically examine comparisons from different authors in a bid to gain deeper knowledge and understanding of historical events that involved national security, legislations, and protection of fundamental civil rights in the US. The researcher used computers, libraries, and internet to access archived data and online content required for purpose of the study.

⁵ Ibid, 890.

⁶ Ibid, 895.

⁷ Ibid, 22.

2.3.1 “Necessary” Scale

A critical piece to this study is the review of the self-made necessary scale. The idea of applying a scale, or test, to this argument came from Justice Jackson’s three-pronged test in the *Youngstown Sheet & Tube Co. Supreme Court Case* (1952). In his concurring opinion, Justice Jackson rejected the idea of strict boundaries between Congressional and Presidential power, and instead developed a three pronged test to determine whether the President had legitimate authority to act in the manner that he or she did.⁸ Justice Jackson’s three pronged test was based upon three variables: first, and most legitimate, were cases in which “[t]he President acts pursuant to an express or implied authorization of Congress.” Second, is when Congress has been silent on the issue. And finally, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”⁹ While Justice Jackson’s three variables have some more objectivity than the variables I have selected, the scale designed for this thesis was meant to apply a level of quantitative analysis to the historical and contemporary examples in a similar fashion to Justice Jackson’s three pronged test. The necessary scale in this thesis is predicated upon three variables: the severity of the threat to the country, the imminence of the threat, and the ability to counter the threat. While each one of the variables has a certain level of subjectivity within itself, the goal is to apply a new perspective on the debate between national security and civil liberty. It is important to note that this scale is not the “end all be all” in this research. It is a way to apply a level of quantitative analysis to this discussion, which will always have a higher level of subjectivity from various different experts.

⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁹ *Ibid.*

2.3.2 Necessary Scale Quantitative Analysis

Each variable on the scale is given a point system of zero through five. For the variable: severity of the threat to the country, the closer the score is to the number five, the more severe that threat was to country. By “severity of the threat to the country,” for the purposes of this thesis, a level five on this scale is the destruction of the United States as we know it. This could be through nuclear war, civil war, or an invasion of another superpower to name a few. Conversely, the lower the number is on the scale, the less likely that said threat would do great damage to the nation. Examples of events on the level zero of this scale would be events that may have had a national impact in their aftermath but, were isolated events in a particular state or region of the country that did not threaten the nation as a whole. Imminence of the threat follows the same logic. The closer to the number five an event is given for imminence of the threat, the more likely the threat would occur shortly after the threat was identified. An example of a level five in this category would be an event like a missile strike or nuclear launch where the leadership of the country may only have a few hours, if not minutes, to make a decision and apply an appropriate reaction. For this variable, the assumption is made that the threat was credible. Conversely, the closer the number is to a level zero, the longer the country had time to prepare for the threat. An example of a level zero imminence threat would be a threat that was intercepted with no definitive strike date and tracked for several weeks, months, or more. Finally, for the ability to counter variable, the closer the number is to five, the lower the ability the country had to counter the identified threat. An example of a level five of this variable would be a surprise attack like the 9/11 World Trade Center attack. Conversely, the greater the number is to zero, the more capable the country was to counter the threat. This would include events where the country had the ways and means to intercept the threat and counter the threat with little to no impact to the country. In all, the scale has a total score of

15 when adding all three variable scores together. Events that are between 11 and 15, I argue, are more justified in the necessity for putting the countries security over civil liberties for that particular threat. Events that score from a seven to a ten, have justification for the necessity however, some of the restrictions imposed by the government are teetering on the edge of abuse of power over necessity. Finally, events that score zero to six have a low justification for necessity and the government's actions can be considered questionable in their response to the threat.

2.4 Summary

The exploratory research design utilized existing data from authors and publications focused on national security laws in the US and how they overrode the Constitution to infringe on civil liberties. The design was desirable, as it provided a clear comparison on the study topic to define the difference between strict judicial scrutiny on security legislations and lower levels of scrutiny. Furthermore, this method drew conclusions based on existing writings and experiences regarding war times in the US and impact on civil rights.

3.0 Literature on National Security and Civil Freedoms

The purpose of this chapter is to review literature focused around scholars who have written or contributed to the study of national security and civil liberties. This chapter will accomplish this objective by providing context for my own research in later chapters, show relationships between previous studies/theories, and find similarities and difference in main ideas, conclusions, and theories on the topic. The goal is to set the foundation where one can then place my own research within the context of the existing literature therefore making a case for why further study is needed.

3.1 Prioritization of National Security

According to Dexter Fergie, a Ph.D. student at Northwestern University, the concept of “national security” in the United States has not been defined clearly yet. In his opinion, some people consider refugees as the biggest national threat while others consider things like imported automobiles and Chinese dating apps like the Grindr as the biggest security threat for the country. However, the author believes that the national security imagination in the country has been changed considerably after the 9/11 incident that was able to convert a civilian aircraft into a ballistic missile¹⁰.

Dexter Fergie’s arguments and findings seem to be extremely relevant. Some of the recent reports by the security agencies in the country support the findings of Dexter Fergie. For example, a recent report by the National Security Agency Central Security Service (NSA/CSS), the United States faces plenty of real and grave national security threats today. The report says that extremism and international terrorism across the world are a big threat against the country as

¹⁰ Dexter Fergie. The Strange Career of ‘National Security’. The Atlantic. September 29, 2019. Accessed on 16 March 2020. <https://www.theatlantic.com/ideas/archive/2019/09/the-strange-career-of-national-security/598048/>

well as to the allies of the country. Apart from terrorism, some of the hostile foreign governments such as Iran and Syria that engage in activities such as terrorist trade is causing a big threat to homeland security. These governments try to acquire weapons of mass destruction and/or the materials to produce them. Moreover, tons of illegal drugs are smuggled into the United States every year. Apart from the aforementioned threats, the United States faces plenty of security threats in cyberspace which can cause immense damages to U.S. national and economic security¹¹.

The information provided in the report seems to be realistic and convincing while considering some of the incidents that happened in the world in recent times. The Islamic world in general and the countries such as Iran, in particular, are causing plenty of security threats to Americans. Soviet Union was the biggest threat to the USA in the past. Today, China is causing all types of security threats to Americans. Many of the enemy countries of the US have weapons of mass destruction (WMD) such as nuclear, radiological, chemical, and biological weapons as well as Improvised Explosive Devices (IEDs). Although many of these countries do not have enough capabilities to challenge the USA, they can cause indirect security problems to the country through various channels. It is impossible for the United States or any other country in the world to anticipate from which channel the actual threats are coming. As technology advances, antisocial elements have more options for striking their targets. They can invent new channels of operation as happened in the case of the 9/11 attack. The world is currently suspecting an invisible hand of some antisocial elements in the spreading of COVID-19. Both the USA and China are currently blaming each other for the development and spread of this

¹¹ National Security Agency Central Security Service (NSA/CSS). "Understanding the Threat." Accessed on March 16, 2020. <https://www.nsa.gov/what-we-do/understanding-the-threat/>

virus. In any case, it is a fact that the USA is currently facing enormous health-related security threats because of coronavirus.

Former U.S. President George W Bush has written a book, *The National Security Strategy of the United States of America*, in 2009. It was published by Morgan James Publishing on April 1, 2009. In this book, Bush claims that the United States has enormous power and influence to address any type of security challenge. However, he calls for an ambitious national security strategy that is based on idealistic goals and realistic means. He argues that America should lead by example and deed while dealing with security-related challenges¹².

Bush's claims and opinions in the aforementioned book are partly right and partly wrong. It is a fact that the United States was able to win its war on terror in Iraq. However, the same thing cannot be said about its war on terror in Afghanistan even after two decades from the commencement of this war. At present, President Trump is trying to escape from Afghanistan after making a ceasefire agreement with the Taliban. It is not clear whether a ceasefire agreement at this juncture is good for the national security of the country as Taliban terrorists are still active in Afghanistan. They can conduct terrorist activities against the country in the future if the war on terror is stopped now.

According to Benjamin Friedman, the national security concept has been changed drastically after the 9/11 attack on the United States of America by the Al-Qaeda terrorists. The immediate outcome of the attack was the construction of the Homeland Security Act (HSA) and the formation of the Department of Homeland Security (DHS). The DHS is responsible for the coordination of all homeland security activities done by agencies or departments such as the

¹² George W Bush. *The National Security Strategy of the United States of America*. Morgan James Publishing 2009.

Customs Service, Coast Guard, and U.S. Secret Service. The arrival of DHS resulted in the loss of importance for the Office of Homeland Security. Today, DHS is responsible for protecting the people and properties of the USA from all types of external threats such as the threats of Weapons of Mass Destruction (WMD) and Improvised Explosive Devices (IEDs)¹³.

Friedman has mentioned plenty of measures taken by the government to ensure the safety and security of the people after the 9/11 incident. However, the majority of these measures address only external security threats. However, the country is facing a lot of internal threats now. For example, some of the recent reports by the FBI have shown that high school students are targeted by extreme groups to conduct their terrorist activities inside American soil.¹⁴ However, it looks like the security policymakers in the country are still not much bothered about the internal security threats. National security policies should address both internal and external threats. However, there is a gap in the literature concerning internal security threats.

The article, *What Were the "Original Intentions" of The Framers of the Constitution of the United States*, written by Harry V Jaffa and published by the *University of Puget Sound Law Review*, mentions the actual intentions of the framers while writing the US Constitution. The article says that the framers considered the security of the people as the primary objective of the federal government that includes branches like the judiciary, executive and legislature. The framers believed that a civil society that consists of individual human beings or citizens gives consent to the government for all measures taken for providing them with adequate security. The 1780 Massachusetts Bill of Rights has given the right to the people for independence. Moreover, it mentions a voluntary association of individuals in which the whole people agree with each

¹³ Benjamin, Friedman, H. 2011. "Managing Fear: The Politics of Homeland Security." *Political Science Quarterly*, 126(1), p.78-80

¹⁴ Office of partner engagement: FBI. "Preventing Violent Extremism in Schools". Last modified January 2016. Accessed on March 15, 2020 <https://info.publicintelligence.net/FBI-PreventingExtremismSchools.pdf>, p.3

citizen and each citizen agrees with the whole people for the implementation of certain laws for the common good¹⁵.

The framers feared that an uncontrolled executive could undermine or sacrifice civil liberties and national security. However, while developing the Constitution, the framers never anticipated the new threats that may cause problems to national security. For example, President Donald Trump is currently facing an impeachment motion because of his unholy ties with Russia and Ukraine during the last Presidential election in the country. Those who want to impeach Trump argue that the President has jeopardized the national security while seeking the support of the countries in the last Presidential election. The framers never anticipated a scenario like the aforementioned one. They never anticipated that either a President or a Presidential candidate seeks support from enemy countries and jeopardizes the national security although they had put a norm in the Constitution for impeaching a President in certain situations.

Lewis Rice in his article, *A clear and future danger Blum explores 'Invisible Threats' in national security and law*, published by the *Harvard Law Today* on July 1, 2013, explores the future of national security. In his opinion, the future of national security is a big question in the United States considering the increasing threat from invisible sources and technologies such as Artificial Intelligence (AI) that are capable of doing complex jobs such as picking out missiles in photographs, or people in crowds. The author says that the enemies of the USA can

¹⁵ Harry V Jaffa. What Were the "Original Intentions" of The Framers of the Constitution of the United States? University of Puget Sound Law Review Vol. 10, No.351
<https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1246&context=sulr> p.435

use AI-controlled drones and conduct targeted killings in the country. As per his views, it is difficult for security agencies to control or counter such threats easily¹⁶.

The views and opinions of Lewis Rice are extremely relevant at present because antisocial elements can stay anonymous and still able to strike targets in the US using computer and internet related means or technologies. For example, China has a well-developed AI-related technology and it can use that technology against the US in multiple forms. They have already engaged in cyberwarfare against the US using cyber technologies including the AI.

According to Philip B. Heymann, the greatest security-related challenge facing by the USA is not about defeating terrorism, but about keeping consistency with the democratic values of the country while dealing with terrorism. In his opinion, the country has faced plenty of criticisms in the past regarding its inability to fight against terrorism using democratic means. While using democratic means against terrorism, the United States can convince others and gather more support for its counterterrorism measures. As per Heymann's views, it is necessary for the country to improve the intelligence sharing with its allies further for the fight against terrorism and to keep the country as a secure place¹⁷

As noted by Jason Mazzone, during security crises, the U.S. federal government must provide adequate funding to the states and cities along with the necessary resources or equipment to overcome the security threats. He has quoted the views of plenty of governors and mayors in

¹⁶ Lewis Rice, "A clear and future danger? Blum explores 'Invisible Threats' in national security and law." Harvard Law Today. July 1, 2013. Accessed March 15, 2020. <https://today.law.harvard.edu/a-clear-and-future-danger-blum-explores-invisible-threats-in-national-security-and-law/>

¹⁷ Philip B. Heymann. Terrorism, Freedom and Security: Winning Without War. Cambridge, Mass: MIT Press, 2003, p.220

the country and argues that the federal government must take the burden of preventing terrorist attacks in any part of the country. At the same time, the state governments or local governments have the responsibility of providing the necessary manpower to the Executive branch when it deploys personnel and other resources for domestic security¹⁸.

The views of Jason Mazzone regarding the role of state and federal governments during security crises seem to be logical. Local governments have many limitations in dealing with security-related issues especially the external security threats. At the same time, the local government can take responsibility for dealing with internal security threats. There is no point in asking the support or blaming the federal government when a state or city faces internal security threats.

According to David A. Baldwin, the government needs to follow the marginal value approach instead of the prime value or the core value approach, while dealing with security issues. The prime value approach considers security as the most important thing for all actors in all situations. This approach says that there is no point in limiting the allocation of resources to security although absolute security is unattainable. The core value approach considers security only as one among the several other important things. On the other hand, the marginal value approach considers security as a subjective value. In other words, this approach considers the need for security for a country, the historical context of a country and the resources available for that country before deciding how much security is necessary for that country¹⁹.

¹⁸ Jason, Mazzone. 2005. The Security Constitution. UCLA Law Review, 53(29), Brooklyn Law School, Legal Studies Paper No. 32. Available at SSRN: <https://ssrn.com/abstract=880076>

¹⁹ David A. Baldwin. 1997. The concept of security, Review of International Studies, 23, [https://www.princeton.edu/~dbaldwin/selected%20articles/Baldwin%20\(1997\)%20The%20Concept%20of%20Security.pdf](https://www.princeton.edu/~dbaldwin/selected%20articles/Baldwin%20(1997)%20The%20Concept%20of%20Security.pdf) p.20

Both theoretically, and practically, the marginal value approach seems to be the preferable one for the United States of America compared to the other two. There is no point in giving prime importance to security and utilize plenty of resources when the challenges are less. Today, the United States faces fewer security threats compared to security threats in the past. It should be noted that the threat from former Soviet Union is no more there. Moreover, the killing of Osama and Saddam has made the country safer. At the same time, the government needs to keep a vigilant eye on global events that may cause future security threats to the country.

According to Peter Bergen, a well-respected national security analyst at New America, many of the security policies of the Trump administration are questionable and illogical. He has pointed out that the current administration has enforced a “Muslim ban” against countries such as Syria that had nothing to do with terrorist attacks against the U.S. Trump’s decision to withdraw troops from Afghanistan has not been taken after the consultation with the military leaders in the country or at the waterfront. The author has blamed Trump’s decision to shake hands with authoritarian leaders such as Putin and Kim Jong-un. These gestures will send wrong signals to the enemies²⁰.

Peter Bergen is right in saying that the security policies of the United States are visualized as anti-Muslims policies, at least in the Islamic world. As per the Constitutional norms, the United States is a secular democratic country in which people of any religion can stay, work, worship and propagate their religion. However, Trump is trying to enforce a ban on Muslim visitors to the country. As per the Constitutional norms, it is unethical and illegal to segregate people based on their religion or faith.

²⁰ Peter Bergen. Trump and His Generals: The Cost of Chaos. Penguin Press, 2019.

As mentioned in the article “National security” by the American Civil Liberties Union (ACLU), plenty of President s in the past have violated the Constitutional norm associated with civil liberties. The article blames former Presidents Bush, Obama, and Trump for the violation of the civil liberties defined in the Constitution. The article says that the Constitution has not given the President the right to arrest and detain people captured from any battlefield without a trial. However, these President s have misinterpreted the Constitution while dealing with terrorism. The article cites the incidents that happened in the prison at Guantánamo Bay as an example to substantiate its arguments²¹.

The Americans say many things about the civil liberties of people. However, they say little about such liberties of people outside America. As happened in the prison at Guantánamo Bay, plenty of human right violations takes place in the battlefields in Iraq, Syria, and Afghanistan. However, only a few such incidents leak out amidst the tight censoring of such information by the American military.

According to Thomas I. Emerson, the contest between national security and civil liberty is an unequal one. In his opinion, in the clash between the above two, the winner will be national security always. The rights of the citizens will be undermined whenever national security becomes a hot topic of debate. The author has mentioned many clauses introduced by the Supreme Court to prevent the government from violating the civil liberties deliberately in the name of security. Some of such clauses are as follows: 1. Individual liberties have a prominent place in the hierarchy of democratic values 2. Government claims on national security threats must be watched with healthy skepticism. 3. The burden of providing proof for security threats

²¹ ACLU. “National security.” Last modified March 2020, Accessed on 16 March 2020 <https://www.aclu.org/issues/national-security/detention>

rests upon the government. 4. The government does not provide evidence for a vague or speculative threat²².

The governments in the country can threaten the people in the name of national security and violate their Constitutional rights. People will become panic whenever they hear about subjects like terrorism. The 9/11 incident has forced the people to trust the words of the government wholeheartedly when it comes to issues like national security. The tactics of the governments are to make the people panic by providing false threats and security issues and conduct their secret missions of violating civil rights.

²² Thomas I. Emerson. 1982. National Security and Civil Liberties, *The Yale Journal of World Public Order* 9(78)

4.0 Review of National Defense Supreme Court Cases

This chapter aims to review landmark national defense Supreme Court cases to provide context as to what the Supreme Court has previously determined on the subject of national security vs. civil liberties. The purpose of this chapter is to show how broad the Supreme Court has been in interpreting decisions of national defense. These cases were chosen based upon the commonality that all of cases involved a conflict between the balance of national security and Constitutional liberty. Despite this commonality, the cases fall on different spectrums of Constitutional interpretation theories demonstrating that the Supreme Case has no one standard practice when weighing in on the balance between national security and civil liberty.

4.1. *Habeas Corpus Act*, Espionage Act of 1917, and the Seditious Act 1918

The American Civil War is arguably the most devastating internal conflict to have occurred in the history of the United States, and it presented numerous challenges for the government. Extensive atrocities were committed, and the government was caught between pursuing the perpetrators and protecting the citizen's fundamental rights.²³ The war represented significant risk within the United States. The American Civil War led to the creation and execution of the Habeas Corpus Act, which has been recognized as an historic legal document in the US ever since. The aim of the law was to authorize the President, who at that time was Abraham Lincoln, to append the writ if he deemed it fit to restore stability.²⁴ Therefore, it can be argued that this Act prioritized the matter of national security, even when that would come at the expense of specific Constitutional rights. It must be noted, however, that the implementation of the Habeas Corpus Act had limited impact, as President Lincoln had earlier issued suspension orders of the writ prior

²³ J. C. Yoo, "The continuation of politics by other means: the original understanding of war powers," Cal. L. Rev. 84 (1996), 167.

²⁴ "Developments in the law," 1130.

to enforcement of the law.²⁵ Chief Justice Roger Taney issued an oral opinion criticizing Lincoln's decision to suspend habeas corpus stating: "the clause in the Constitution which authorizes the suspension of the privilege of the writ of habeas corpus is in the ninth section of the first article. This article is devoted to the Legislative Department of the United States, and has not the slightest reference to the Executive Department."²⁶ Despite Chief Justice Taney's argument, President Lincoln's order to suspend habeas corpus was upheld. For this reason, the enforcement of the law was just for the sake of formality, as whatever it sought to address was already in place. It could be argued that the actions of President Lincoln, the most senior figure in the government, set a precedent for the modern Presidents, who have demonstrated that they feel they do not have to follow the law to ensure the country is safe from both internal and external attacks.

In the midst of the Civil War, Lincoln issued over nine Presidential orders suspending the use of the Habeas Corpus Act in a bid to solve the problem. Lincoln directed utilization of martial law, for he felt the latter was more suited to the existing circumstances.²⁷ Lincoln's announcements restricted Americans' civil rights in favor of prioritizing demands of authority. Similar procedures followed in other major historic events in the US that involved national security.

Soon after the US joined the First World War, the US Congress decided to enact the Espionage Act of 1917. The primary aim of this law was to protect the US Constitution, government, US flag, and the military from any language that would be considered disloyal, abusive, or scurrilous.²⁸ While the creation and implementation of this law sought to ensure that

²⁵ Ibid, 1133.

²⁶ Joel Park, "Habeas Corpus and Martial Law a Review of the Opinion of Chief Justice Taney in the Case of John Merryman," Cambridge: Welch, Bigelow, and Company (1861), 4-8.

²⁷ Ibid, 1133.

²⁸ D. M. Rabban, "The state of free speech doctrine in 1917," *Ariz. St. LJ* 50 (2018), 911.

every citizen remained loyal during a difficult time for the government, the Act undoubtedly violated the freedom of speech that the Constitution emphasized significantly in an era of democracy. People were not allowed to make any assertion that would be considered a violation of the Act.

After the enactment of the Espionage Act of 1917, Congress passed the Sedition Act of 1918 as an amendment of the Espionage Act.²⁹ The Sedition Act sought to extend the range of offenses covered by the Espionage Act, to enhance its operations. Any American citizen who would express criticism towards the government for its participation in World War I would be arrested for contravening the law. Regardless if the criticism was valid or not; any contrasting views from those of the government would be considered offering support to the enemies. Davis explained that, in times of war, governments tend to undermine free speech in a bid to ensure that the enemy does not benefit in any way.³⁰ This concept further complicates the argument of national security and individual liberties. It is vital to note that during the era in which the Sedition Act was introduced, democracy was still growing in the United States, and for this reason, it remained negotiable. The presidency had the power to undermine the presence of some legislations and consequently create others that would invalidate those already in existence. Indeed, more than 2,000 US citizens were prosecuted for violating the two Acts, and the primary crime they were accused of having engaged in was breach of trust.³¹ The interpretation by magistrates differed from one case to another because there were no distinct standards for accurately determining what amounted to foul language from a defendant. The applicability of these two Acts significantly continues to depend on the prevailing circumstances.

²⁹ A. Davis, "Freedom of speech in times of war: the sedition act of 1918," *Social Education* 79, no. 3 (2015), 127.

³⁰ *Ibid*, 145.

³¹ *Ibid*, 203.

4.2. Executive Order 9066 (Japanese Internment Camps)

The enactment and implementation of the Executive Order 9066 further complicated the debate between national security and Constitutional rights. The law authorized the military to exclude “any or all persons” from designated military areas. It can be argued that the execution of this law targeted people of Japanese origin. The US military detained over 120,000 Japanese people, which consequently resulted in property losses.³² While this law was justified by national security, it subjected detainees to inhumane conditions.³³ It is therefore prudent for judiciary to review cases of racial discrimination, as occurred in Japanese Internment Camps and Korematsu cases.³⁴

The US government, led by President Roosevelt, attempted to justify the importance of the Executive Order using the fear of the attacks at Pearl Harbor as justification for the order.³⁵ US citizens overwhelmingly supported the efforts of their government, for they deemed these strategies fit to ouster their enemies. Even though it could be argued that the law ensured national security, it undeniably resulted in racial animosity against the Japanese “yellow peril.”³⁶ Applicability of this law in times of peace is not viable, as the mass evacuation process was unconstitutional.³⁷ On 19 February 1976, US President Gerald Ford expressed his discomfort with the evacuation of loyal Japanese interns.³⁸ The feeling that some people of Japanese origin could leak information to the Japanese government meant that there was a need to isolate them as a

³² Ibid, 203.

³³ Fairman, pp. 202

³⁴ C. McCaw, “A never ending state of emergency: the danger of national security in emboldening the color line in America” *Miami Race & Soc. Just. L. Rev.* 7 (2017): 327.

³⁵ L. A. Power, “The role of the court,” In *Security v. liberty: conflicts between national security and civil liberties in American history*, edited by D. Farber (New York: Russell Sage Foundation, 2008), 120.

³⁶ A. R. Gonzales, “Legal authorities supporting the activities of the National Security Agency described by the President,” US Department of Justice, 2006, 15.

³⁷ J. W. Whitehead, and S. H. Aden. “Forfeiting enduring freedom for homeland security: A Constitutional analysis of the USA Patriot Act and the Justice Department's anti-terrorism initiatives,” *American University Law Review* 51, no.6 (June 2002), 1097.

³⁸ C. DeVeaux, “Rationalizing the Constitution: the military commissions act and the dubious legacy of ex Parte Quirin,” *Akron L. Rev.* 42 (2009), 13.

security measure, to ensure that no secrets of the US state would leak to one of the country's major enemies during the war. However, while the law may have positively yielded the desired results at the time, its potential applicability in a peaceful environment has constantly been questioned.

4.3 The U.S. Patriot Act in the Wake of 9/11

The United States government has a history of enacting strict counter-terrorism policies aimed at enhancing national security. In the past few decades, the country has been a primary target of terror attacks, both from within and beyond the borders. Such policies were designed to strengthen the position of the state in managing the threat posed by major terror groups, such as Al Qaeda and ISIS. Kaplan outlined how terrorism is a complex crime, which readily changes in nature as the perpetrators seek to achieve their objectives.³⁹ The US government applies its strongest measures to significantly minimize the risks of the use of highly destructive weapons against its people.

Terrorism activities create the need for Constitutional review of security laws.⁴⁰ After the 9/11 attacks, the US President mandated the execution of force on individuals, organizations or nations suspected to have aided in the attack.⁴¹ However, concern arises when innocent citizens suffer the consequences of policies that seek to help the authorities identify terror suspects. The lack of a clear structure in identifying the real suspects with the use of technologically advanced techniques meant that the rights of those who are not involved are violated through interception of their communications and other methods of wiretapping.

³⁹ Kaplan, Abraham. *The counter-terrorism puzzle: A guide for decision makers*. Routledge, 2017.

⁴⁰ Gonzales, "Legal authorities supporting the activities of the National Security Agency described by the President," 15.

⁴¹ *Ibid*, 15.

Another factor that caused the Supreme Court to uphold the order following the 9/11 attacks, despite the fact that these orders undermined the Constitution, was that terrorism is typically an organized crime, and it sometimes requires extensive networks before the final attack is perpetrated. For this reason, those who are physically involved in the final attack are not the only suspects; others play substantial roles in the planning and execution of the crime.

Therefore, there was a necessity for the US government to surveil terror links, as the perpetrators and organizers resided within the civilian population and withheld information about the attack.⁴² This prompted the need for the US government to defer some Constitutional rights, for the purposes of intelligence and information gathering about the attack. In response, the US Congress assumed that the suspected enemies posed an unusual threat to the nation.⁴³ In this context, “unusual threat” implied that the cases would warrant different treatment even when this involved contravening the law. In its ruling on historical prejudices and review of war policies, the court determined that the inhumane detention and treatment was justified. Consequently, Congress accorded the US President power to utilize force that would ensure the enemies were brought to justice for their actions.

The majority of those who were arrested as suspects of the September 11 attacks did not qualify for bails as they posed a greater threat to the nation than suspects of other crimes, and more importantly, it was necessary to detain them to ensure they did not escape. This move resulted in the breach of their right to bail.

⁴² McCaw, “A never ending state of emergency,” 323.

⁴³ Whitehead, and Aden, “Forfeiting enduring freedom for homeland security,” 1133.

The law states that every person should be considered innocent until a competent court proves him or her guilty.⁴⁴ However, with the severity of the event just occurred, the courts agreed with the prosecution that the suspects were too dangerous to be released on bail. Hence, the assumption of innocence was waived for the sake of national security. The government wanted to ensure those who had lost their lives and others who mourned their loved ones saw the justice they deserved, and this goal would be achieved by eliminating all the gaps in the Constitution that would see the offenders walk free.

Other rights or liberties that can readily be waived in the bid to enhance national security are those of a minority group. For instance, the majority can exercise their fundamental freedom and liberty ahead of the minorities in a country.⁴⁵ Simply put, the US is at liberty to ignore some legal rights in combating an enemy. President George Bush assumed that Al-Qaeda's terror attacks affected the lives of the majority; it was, therefore, prudent for the United States to execute mechanisms for self-defense. Although these mechanisms had little impact on the civil rights of American citizens, its consequences infringed on the Constitutional rights of individuals who had no connection to the attack.⁴⁶ These mechanisms furthermore infringed on Americans' rights by allowing unprecedented raids and searches on private home and offices.⁴⁷ Usually, the law requires the police to obtain a search warrant before engaging in any search and seizure practice, however, with national security at stake after the 9/11 attacks, law enforcement officers were permitted to ignore this law in a bid to ensure that the country was safe. For instance, law enforcers

⁴⁴ C. Davis, "Innocent until proven guilty: a solution for America's failed military transparency," Roosevelt Institute, Columbia, 2017, 22.

⁴⁵ Whitehead, and Aden, "Forfeiting enduring freedom for homeland security," 1081.

⁴⁶ Ibid, 1083.

⁴⁷ Ibid, 1084.

were allowed to search with the required urgency any entity in which they became suspicious of hosting evidence of involvement in the terror attacks.

Based on historic events, it has been proven that times of international security threats significantly undermine the US government's approach to safeguarding the fundamental freedoms of its citizens and foreigners.⁴⁸ The 14th Amendment protects the civil rights, life, and property of non-US citizens. Following the 9/11 attacks however, the United States government undermined the rights of aliens in its efforts to safeguard its borders from extremist activities.⁴⁹ The law requires strict investigation and scrutiny of background on persons entering the United States. Persons residing in the US illegally are expelled and expatriated fairly in accordance with the law.⁵⁰ However, this right is, in most cases, violated whenever unlawful immigrants engage in activities that threaten the national security of the country; some are detained and denied the right to have their cases transferred to their local jurisdictions.

Measures implemented due to security threats are less subject to scrutiny regarding consequences on protection of fundamental civil rights and freedoms, as was the case with the Patriot Act.⁵¹ Fairman argued that Patriot Act enforcement was driven by the increasing levels of publicity surrounding politics. In essence, the act was primarily aimed at preventing crimes and holding criminals accountable through prosecution. The criminal justice department acted on Presidential directives in securing innocents from future extremist activities.⁵² While acting in conformance with the Patriotic Act, the justice department detained terrorists without due legal

⁴⁸ Ibid, 1084.

⁴⁹ Ibid, 1085.

⁵⁰ A. Winkler, "Fatal in theory and strict in fact: an empirical analysis of strict scrutiny in the federal courts," *Vand. L. Rev.* 59 (2006), 793.

⁵¹ Ibid, 1095.

⁵² Yoo, "The continuation of politics by other means," 167.

procedure; again, the presumption of innocence was overlooked for the sake of national security.⁵³ Indispensably, every legal provision enacted without proper investigation during war times breached the rights of Americans.⁵⁴ This problem has repeatedly surfaced in the judiciary system to date, and unless there are significant changes, it is bound to continue.

A number of studies have sought to explain the use of the logical approach by the judiciary, designed to balance between actions aimed at enhancing national security and the liberties outlined by the Constitution. DeVeaux conducted an evidence-based study illustrating the use of the logical approach by judiciary to excuse unlawful state actions that intend to protect the people from any internal or external threat to security.⁵⁵ The judiciary is authorized to implement all rights stipulated in the Constitution; however, it utilizes varying tactics when executing orders of importance to national security.⁵⁶ DeVeaux argued against limitations of Constitutional powers due to national security threats.⁵⁷ The US President and the Senate are, therefore, not justified to apply the logical approach in fulfilling their political ambitions. This is because the President can inappropriately apply the logical approach by profiling certain regions, suppressing and even conducting property seizures to persons suspected of engaging in criminal activities that pose a national security threat, with a focus on terrorism.⁵⁸

Several cases demonstrate the judiciary's efforts in guarding the sovereign Constitution against crafty national security legislations.⁵⁹

⁵³ Chemerinsky, "The assault on the Constitution," 1.

⁵⁴ Chemerinsky, "The assault on the Constitution," 1.

⁵⁵ DeVeaux, "Rationalizing the Constitution," 13.

⁵⁶ Ibid, 3.

⁵⁷ Ibid, 13.

⁵⁸ Ibid, 13.

⁵⁹ Devins, Neal. 2018. Congress, Civil Liberties, and the war on terrorism. Congress and Civil Liberties During War, PP 675-708 .<https://www.wilsoncenter.org/sites/default/files/devins.pdf>

4.4. Youngstown Sheet & Tube Co. v. Sawyer

Throughout history, US Presidents have quite often demonstrated special permission and authority for political leaders in response to national security threats. Pushaw attempted to justify the Constitutional limitations of President Truman's orders for the seizure of steel mills during the 1952 security crisis.⁶⁰ Based on his military knowledge, President Truman prioritized national security by authorizing the seizure of steel mills during the Korean War. In his directive, the President sought to solve security threats caused by industrial strikes in steel mills.⁶¹ In its determination on scrutiny of the order, the judiciary ruled that the President so acted beyond his powers as the Commander in Chief; considering the President's powers did not apply to industrial disputes in steel mills, he had no authority regarding containment of the strikes. From the ruling of this case, it was indisputable that legislations passed in support of national security abrogated Constitutional provisions.⁶²

4.5. Guantanamo Military Commissions

In 2002, US President George Bush announced plans to intensify intelligence aimed at the identification, trial, and detention of foreigners suspected to be involved in terrorism activities by the military. Bush's authority to try and detain the terror-suspected foreigners complied with the "logical order." While the military courts had the authority to initiate legal proceedings against war captives, it was at the judiciary's discretion to prosecute all the war captives within the borders of the United States.⁶³ The President and Congress were in contravention of the Constitution.⁶⁴ In their capacity, the President and the Senate created Constitutional disorder by failing to clearly

⁶⁰ B. Schwartz, "Inherent executive power and the steel seizure case: a landmark in American Constitutional law," *Can. B. Rev.* 30 (1952), 466.

⁶¹ R. J. Pushaw Jr., "Justifying wartime limits on civil rights and liberties," *Chap. L. Rev.* 12 (2008), 690.

⁶² *Ibid.*, 7.

⁶³ Emerson, "National security and civil liberties," 123.

⁶⁴ *Ibid.*, 124.

separate judicial and military mandates. This culminated in the case of *Hamdan v. Rumsfeld*, where the high court ruled that the President was in violation of the Constitution, therefore, invalidating the orders.⁶⁵

4.6 Ziglar v. Abbasi

The Ziglar v. Abbasi lawsuit was filed and the ruling made in the Supreme Court of the United States where the court determined that the unlawfully present aliens who had been arrested immediately in the aftermath of the 9/11 attacks cannot sue for money from high-level officials based on the conditions of their confinement.⁶⁶ The case was argued on 18 September 2017, and it was consolidated with the other case laws on *Hastey v. Abbasi*, and that of *Ashcroft v. Abbasi*. The civil lawsuit had been filed by the Center for Constitutional Rights (CCR) against the group that comprised of the then Attorney General John Ashcroft, the FBI director Robert Mueller, and former INS Commissioner in Brooklyn.⁶⁷

The case had also been filed by the CCR on behalf of a number of South Asian, Muslims, and the Arab non-citizens who had been accused of the immigration violations and had been held in detention for several months after the occurrence of the 9/11 attacks. This lawsuit aligned with the response of the government towards the September 11 attacks, and the focus of the government had been aligned at attaining of the desired national security for the United States government. Therefore, the government through the use of the federal officials ended up finding and detaining the illegal aliens who were present in the country at the time, and this totaled to 762 people being arrested with 60% of the number coming from the New York area.⁶⁸ The

⁶⁵ Ibid, 126.

⁶⁶ 86 Fordham L. Rev. 2149 (2017-2018) *Ziglar v. Abbasi and the Demise of Accountability*

⁶⁷ Ibid, 2150.

⁶⁸ Ibid, 2155.

aliens who had been considered to be of high interest to the matters of the national security were not deported, but instead they were held pending clearing by the Federal Bureau of Investigations (FBI).

The actions of the government acted as an open indication of the violation of civil liberties for the affected individuals over the acts of prioritizing the United States national security. Therefore, the plaintiffs sued the United States District Court for the Eastern District of New York on allegations that the behavior of the U.S. Department of Justice had violated the Equal Protection Clause and the substantive due process clause aligning with their actions of detaining the aliens.

The actions of the government were found to allegedly violate the First, Fourth, and Fifth Amendment rights due to their intrusion on the civil liberties of the affected individuals.⁶⁹ The ruling of the case determined that the Immigration and Naturalization Service had unlawfully held the plaintiffs for several months even after their immigration cases had been completed, and the reasons for the government holding the suspects was to undertake further investigations of their potential links to the terrorism cases.

The violation of the civil liberties of the affected individuals over the priority of the national security was also aligned to the conditions of the detainment for the prisoners. The court ruling determined that the conditions and the length of their detainment had violated the rights of the prisoners as they were being held in the Administrative Special Housing Unit (ADMAX SHU).⁷⁰ This affected them because they were deprived of establishing contact with

⁶⁹ Ibid, 2157.

⁷⁰ Ibid, 2157.

their families, friends, and attorneys, and there were various presence of inhuman treatments that were conducted in the form of verbal and physical abuses.

The Supreme Court ruling on the case ended up determining that the aliens who had been unlawfully present and arrested in the aftermath of the September 11 attacks could not sue for money from the high-level federal officials based on the aforementioned conditions of their confinement.⁷¹ The *Ziglar v. Abbasi* lawsuit acts as a clear illustration of the actions of the government in prioritizing the matters of the national security over the civil liberties of the citizens. A number of sources such as the civil rights groups have claimed that the *Ziglar v. Abbasi* lawsuit acted as a conspiracy towards violating the equal protection rights of the individuals in the United States. The case acted as a proof of the fact that the United States places greater priority on the matters of the national security, and that at times such as during the emergencies the government might end up giving little concerns to the matters of civil liberties in the efforts of working for the desirable aspects of the national security.

4.7 Terry v. Ohio

The *Terry v. Ohio* case was conducted in 1968 and comprised of a landmark Court decision where ruling made by the court enforced the Fourth Amendment's interpretation on unreasonable searches and seizures were not violated in the cases where the police officers stops the suspects on the streets and frisks them without the probable cause for undertaking the arrest.

Through time, this Court decision has cumulatively helped with attaining of the desired aspects of the national security. The ruling made by the court allows the police officer who has a reasonable suspicion towards a person who has committed, is committing, or the one who is

⁷¹ Ibid, 2162.

about to commit a crime to stop and frisk them. The ruling also applies for the individuals whom the police might have reasonable belief of the fact that they might be armed and presently dangerous.⁷²

The Terry v. Ohio case extended during the 2004 case on Hibel v. Sixth Judicial District Court of Nevada where the Supreme Court ended up providing the ruling that it was required for the suspect to identify themselves during the stop and frisk process by the police.⁷³ Such process did not necessarily constitute of the violation for the Fourth Amendment and its prohibitions on the unreasonable searches and seizures. Therefore, the Terry v. Ohio acts as part of the landmark Court decision in the United States that helped to strengthen the matters of the national security and obtain the required balance with the aspects of civil liberties for the citizens.⁷⁴ The decision provided for the police to perform the search on the suspected individuals helps with ensuring that the general security for the community and the public in general has been attained and maintained, and that the public will remain confident knowing that they are safe and that their liberties have not been affected through the process.

4.8 District of Columbia v. Heller

The District of Columbia v. Heller lawsuit forms the key court case ruling in a series of the firearm court cases that have been filed in the United States courts. The District of Columbia v. Heller lawsuit acted as a landmark case in which the Supreme Court of the United States held to the outlines of the Second Amendment which protects the right of an individual to keep and bear arms even when unconnected with their service in the militia, and for the traditional lawful

⁷² 74 Miss. L.J. 423 (2004-2005) Terry v. Ohio at Thirty-Five: A Revisionist View

⁷³ Ibid, 425.

⁷⁴ Ibid, 430.

purposes such as self-defense within homes.⁷⁵ The ruling also determined that the handgun ban and requirement of owned rifles and shotguns being kept disassembled and unloaded in the District of Columbia was unlawful.

The issue of the gun control in America has been reviewed through time based on the contradictory circumstances in which the arms are meant to be obtained and used. Prior to the lawsuit, obtaining of the firearms had been limited to certain groups of individuals, and this is the move that had largely been seen as a violation of the civil liberties in connection to the rights of safety and protection for the individuals. However, the challenge made on the ruling had the Supreme Court striking down the provisions that had been made on the Firearms Control Regulation Act of 1975 as being Constitutional.⁷⁶

The provisions on the issues of the gun control forming part of the violation for the civil liberties of the citizens could be evidenced, by its relation and the questions that surrounds the issue, on whether the protections that have been provided in the Second Amendment were met.⁷⁷ Additionally, on whether the Due Process Clause that has been provided in the Fourteenth Amendment against the states was attained through the process. The civil liberties of the individuals had openly been violated from the moves that different government and legislative bodies had made on taking down some of the provisions from the Firearms Control Regulations Act of 1975.⁷⁸ Thus reinstating those provisions through the Supreme Court ruling on the District of Columbia v. Heller case meant that even though the priority of the government

⁷⁵ 12 J. Gender Race & Just. 57 (2008-2009) Much Ado about... Something Else: D.C. v. Heller, the Racialized Mythology of the Second Amendment, and Gun Policy Reform

⁷⁶ Ibid, 62.

⁷⁷ Ibid, 65.

⁷⁸ Ibid, 72.

aligned to the attainment of the national security, the civil liberties of the citizens were still important and ought to be prioritized as provided for in the United States Constitution.

4.9 Doe v. Chiquita Brands International

The Doe v. Chiquita Brands International formed the class action lawsuit that concerned the funding and arming of the known terrorist organizations, an aspect that has great consequences for the national security.⁷⁹ The lawsuit was filed by the Colombian families in the United States District Court of New Jersey on 13 June 2007, and they were represented by the Colombian Institute of International Law (CIIL), and the Earth Rights International (ERI).⁸⁰ The case was filed against the producer and distributor of Chiquita Brands International which was based in Cincinnati and the lawsuit alleged that the company had funded and armed the terrorist organizations in Colombia, which had been designated by the U.S. Secretary of State.⁸¹

The allegations made against Chiquita Brands formed a great issue of concern for the national security and acted as the basis that would be referenced upon for the other related terrorism funding cases. The case had 144 plaintiffs alleging that the terrorists who were being funded by Chiquita Brands had been involved in killing 173 individuals who were then legally being represented by the plaintiffs.⁸² The killing reported had occurred for a lengthy period of between 1975 and 2004, but majority of the killings had occurred from the early 1990s.⁸³

The Doe v. Chiquita Brands International case represented one of the concerning issues in the national security matters. The lawsuit had resulted in Chiquita Brands admitting its

⁷⁹ Harn, R.W., and Sunstein, C.R. "A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis." *University of Pennsylvania Law Review*, 2002: 1489. <https://www.jstor.org/stable/3312946>.

⁸⁰ Ibid, 1495.

⁸¹ Ibid, 1500

⁸² Ibid, 1502

⁸³ Ibid, 1520.

involvement towards paying of the Colombian terrorists through the subsidiary company that had been sold, and the company cited the aspect of seeking protection for its employees as being the key reason for their involvement in making the payments.⁸⁴ The case concluded with the company being found guilty of doing business with the terrorist organization. Thus the Court decision was made where the company was required to pay the fine of \$25 million, and the agreement made also arrived at hiding the identities of the senior executives in the group who had been involved in approving the illegal payments to the terrorist organization.⁸⁵ The Court decision in the Doe v. Chiquita Brands International helps to illustrate the levels in which the government prioritizes on the issues of national security. The ruling made also provides the platform that could be used in the future to make the rulings that would concern the companies that are involved in funding the terrorist organizations, which are a great threat to the national security.

⁸⁴ Ibid, 1528.

⁸⁵ Ibid, 1552.

5.0 Analysis and Interpretation Techniques of the Study Findings

This chapter presents techniques used in the analysis and interpretation of the study findings. Similar to Adam Winkler's empirical analysis of Supreme Court strict scrutiny, this chapter aims to explain the quantitative analysis behind the discussion of favoring national security over civil liberties. Furthermore, this chapter displays the chart and graphed numerical evaluations given to the selected national security events for the necessary scale.

5.1 Effect of Strict Scrutiny of National Security Law on Civil Rights

The researcher sought to establish the effect of strict investigation of national security legislation on individuals' Constitutional liberties in the US in times of war. A study by Winkler concluded that strict scrutiny of security-related legislations positively correlates with infringement on civil rights ($p < 0.00$). The findings of Winkler's research are shown in Table 1.

Table 1: Strict scrutiny and its correlation to citizens' rights infringement

Note: for this table, "citizens' rights infringement" is defined as cases where the courts sided with the individual that made the civil liberties complaint. The infringement rate is how common the courts sided with the individual as it pertained to the Constitutional right or liberty.

Constitutional Right or Liberty	Infringement Rate
Freedom of association	33%
Right to religion	59%
Racial discrimination	71%
Fundamental rights	68%
Freedom of speech	22%
F = 9.988, $p < 0.00$	

(Source: Winkler)⁸⁶

The findings presented in Table 1 show that strict scrutiny on security-related legislations passed during security emergencies affect Constitutional civil rights through freedom of association (33%), right to religion (59%), racial discrimination (71%), fundamental rights (68%), and civil freedoms (22%).

There are various institutions tasked with scrutiny of legislations during security emergencies, as well as of the legislations' effect on civil rights and execution of implementation in the United States. Some of these bodies are recorded in Table 2.

Table 2: Strict scrutiny by government institutions in the US

Strict Scrutiny-enacting Government Institution	Rate of Involvement
Judiciary	54%
Penal Institutions	74%
Congress	49%
State Legislation	58%
Local government	42%
Other	28%

Source: Speece and Yokum⁸⁷

The Constitution protects and upholds the utmost respect for individual civil liberties. The findings in Table 2 show that the protection of fundamental freedoms applies in all areas where the state can infringe on peoples' rights. In its efforts to counter security threats, measures implemented by the government may adversely affect the rights and freedoms of citizens; for example, pretrial, whereby an individual is held in custody or even detention for purposes of national security. The state is legally allowed to detain suspects of terror activities or crimes that

⁸⁶ Winkler, "Fatal in theory and strict in fact," 793.

⁸⁷ Yokum, David. "Vermont Law Review." Vermont Law Review, 2015. <http://lawreview.vermontlaw.edu/wp-content/uploads/2016/03/40VtLRev285-Speece.pdf>.

pose threats to national security.⁸⁸ War times are, however, characterized by mass deprivation of Constitutional rights of persons, which contravenes international human rights laws that demand due legal procedure in the execution of detentions and trial.⁸⁹ It is, however, notwithstanding those laws passed during security emergencies or war times tend to be the subject of minimal investigation to determine their impact on civil liberties. For instance, one outcome of Executive Order 9066 included the exclusion of foreigners of Japanese origin in Internment Camps. The order unfairly subjected aliens to racial discrimination by the government in the name of national security.⁹⁰ Based on the Order, the aliens were treated as convicts if failing to submit themselves for imprisonment in the camps. The military deprived Japanese foreigners in the US of their freedom via guilt by race. The US government further passed laws prompting detention of terror suspects without due procedure during World War I and II.⁹¹ Concurrently, scrutiny of security legislations during war times or national security emergencies may force citizens to abandon their civil rights. For instance, shortly after the 9/11 attack, the US established the Patriot Act, which was driven by political objectives; thus, no legal evaluation was conducted to assess the Act's protection of individuals' Constitutional liberties.⁹² The Act, however, resulted in misuse of power by authorities and mass contravention of civil liberties.

The extent of the literature has been proven that, in instances of war and amid heightened security concerns, US authorities significantly override legally recognized due process. For example, the *Writ of Habeas Corpus* case indicates that Congress had the authority to suspend habeas corpus. The Supreme Court disbanded use of military courts in the states where judicial

⁸⁸ Office of the United Nations. 2013. Human Rights, terrorism and counterterrorism. Access from <https://www.ohchr.org/documents/publications/factsheet32en.pdf>

⁸⁹ Office of the United Nations, 21

⁹⁰ Yoo, "The continuation of politics by other means," 167.

⁹¹ Ibid, 167.

⁹² Gonzales, "Legal authorities supporting the activities of the National Security Agency described by the President," 88.

civilian courts were still operational.⁹³ This culminated in a mass rebellion, which demonstrated the need for the writ, thereby indicating that the Constitution failed to clearly define and separate powers. It appears implausible that scrutiny of the laws created in times of war failed to create a clear definition of actual rules that consider the rights of the citizens.⁹⁴ Similarly, this indicates that the legislations passed in response to war crises failed to strike a harmonious balance between the government security objectives and protection of the rights and freedoms of citizens. It is, however, unrealistic for the military to act reasonably, considering even courts misrepresent the Constitution to justify whatever measures the military deems expedient to restore national safety. Kelly affirmed that executive orders issued on military grounds regarding matters of national security quite often bypass legislative investigation. 54% of the judicial systems oversee violations on civil liberties, which should otherwise have been protected in times of national security crises.⁹⁵ Such occurrences have resulted in a violation of civil liberties, yet scrutiny is never really considered at the time the laws and measures are undertaken.

5.2 Application of the Necessary Scale

Table 3: Necessary Scores by Event

Event	Threat to the Nation	Imminence of Threat	Ability to Counter the Threat	Overall Score
Suspension of Habeas Corpus (1861)	5	5	5	15/15
Espionage and Sedition Acts (1917)	2	2	2	6/15
Japanese Internment Camps (1945)	2	4	2	8/15
Youngstown Sheet & Tube Case (1952)	1	1	1	3/15
Patriot Act (2001)	4	5	3	12/15

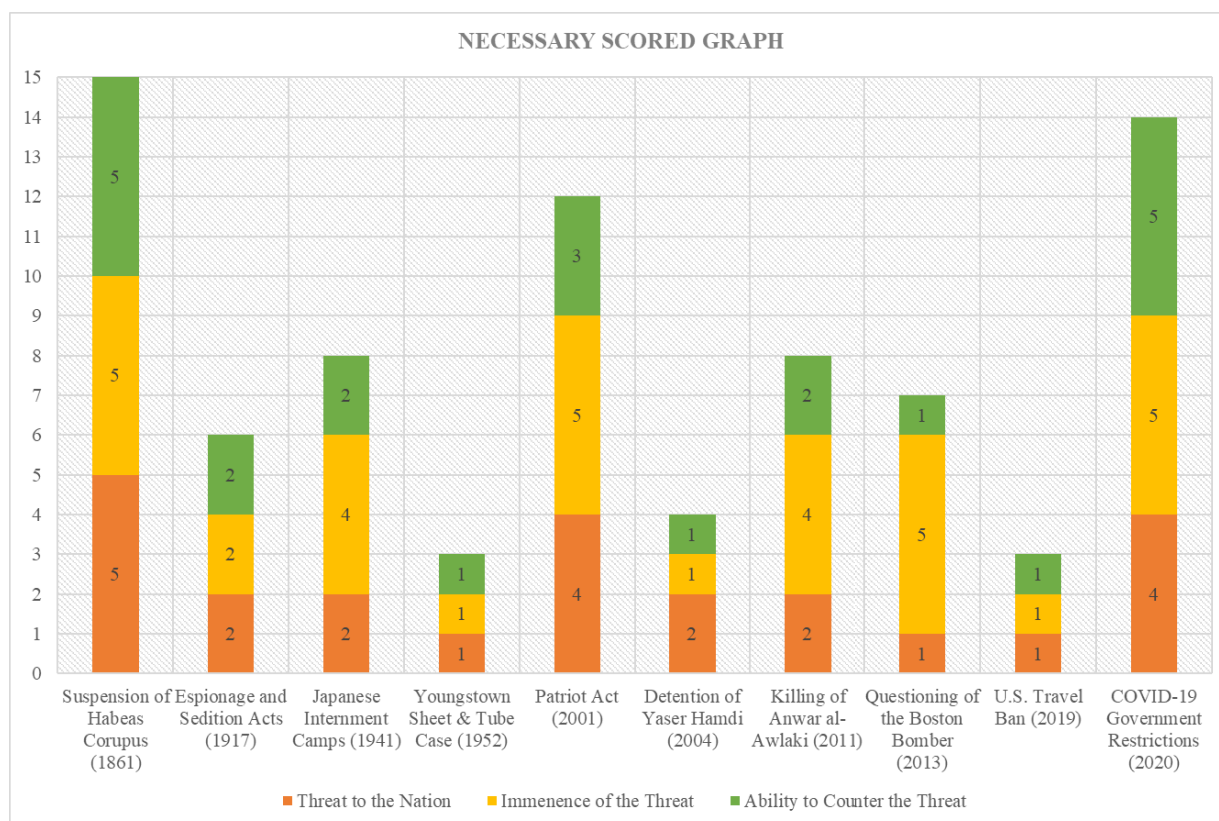
⁹³ Pushaw, "Justifying wartime limits on civil rights and liberties," 683.

⁹⁴ Chemerinsky, "The assault on the Constitution," 1.

⁹⁵ Ibid, 1.

Detention of Yaser Hamdi (2004)	2	1	1	3/15
Killing of Anwar al-Awlaki (2011)	2	4	2	8/15
Questioning of the Boston Bomber (2014)	1	5	1	6/15
US Travel Ban (2019)	1	1	1	3/15
COVID-19 Government Restrictions (2020)	4	5	5	14/15

Figure 1: Necessary Scored Graph



6.0 Analysis on Necessity

This chapter presents the breakdown and logic of the scoring applied in the self-made necessary scale regarding the three variables and the national security events they apply to. Again, the scale is predicated upon three variables: the severity of the threat to the country, the imminence of the threat, and the ability to counter the threat. The national security events selected in this chapter were chosen as critical events throughout American history that changed the way America conceptualized national security. These events, and the subsequent aftermath of each event, challenged not only the idea of how we protect the U.S., but where do we prioritize civil liberties in this scheme of protection.

6.1 Suspension of Habeas Corpus (1861)

The United States Civil War is considered one of the most devastating internal conflict in the country and presented massive challenges for the government and their role in preserving the Union. In an attempt to slow down the rebellion and Southern insurrection, President Lincoln authorized the Army and Navy to arrest and imprison those that were providing "...comfort to the enemy and plotted to betray the government..."⁹⁶ While this act forestalled many schemes and conspiracies that were starting to take shape, President Lincoln was not able to convict any of those imprisoned by a court of law until they had committed an overt act.⁹⁷ Most of those who were arrested, were released within a day or two due to habeas corpus which protects Americans from unlawful imprisonment.⁹⁸ Failing to reach a quick and actionable remedy for this predicament, President Lincoln decided it was in the best interest of the nation to arrest the

⁹⁶ S. G. F. "The Suspension of Habeas Corpus During the War of the Rebellion." *Political Science Quarterly* 3, no. 3 (1888): 454-88. Accessed May 7, 2020. doi:10.2307/2139053.

⁹⁷ *Ibid*, 455.

⁹⁸ *Ibid*, 455.

Southern rebels without a warrant and disregard any writ of habeas corpus, thereby suspending habeas corpus altogether. This act was an unprecedented and pivotal point in American history that clearly violated the Constitution by which the President and military swear an oath to. This begs the question, was it necessary to suspend habeas corpus to preserve the Union?

When reviewing the action of suspending habeas corpus on the necessary scale, the action received the highest score on the scale, 15. Scholar agree that the primary goal of the South during the American Civil War was to secure independence from the North and establish an independent nation on the continental U.S. If the South had won the Civil War, they would have destroyed the very fabric of the United States government, Constitution, and end the United States of America as we know it by separating it into two independent nations. For this reason, the threat to the nation was the highest it has ever been from the conception of the nation to Lincoln's decision to suspend habeas corpus and deserves a five for the variable, threat to the nation on the scale. It should be noted that a score closer to five illustrated that the event was a severe threat, with five being the highest score, illustrating the highest severity.

The imminence of the threat, or how quickly the threat would take place upon notification or realization of the threat, also deserves the highest score of a five on the necessary scale for this variable. As the first shots were fired on Fort Sumpter, Lincoln knew that the Confederates were at an all-time high in confidence and looking for their next move against the Union. In an attempt to quell the rebellion early and swiftly, Lincoln sent his troops to the Virginia front which resulted in the first major defeat of the Union forces and Bull Run in July of 1861.⁹⁹ For reference, Lincoln formally suspended habeas corpus in September 1861

⁹⁹ Ibid, 462.

demonstrating how quickly the rebellion was evolving and becoming uncontrollable. To Lincoln, he had no time to wait and allow the rebellion to grow and further his military losses. The immense of the threat was at its most severe which required extreme action.

The Union was taken by surprise and on their heels when the South attacked which made their ability counter the threat almost impossible. Originally, Lincoln thought the Civil War would be a quick victory for the better equipped Union military. However, as previously discussed, Lincoln's first attempt at a military counter offense failed horribly. This forced Lincoln to have to rethink his strategy and develop a new solution for how to counter the Southern aggression. With few practical and actionable plans, the ability for the Union to counter the South at the start of the war was very limited granting this variable a five on the necessary scale. Many historians argue that the first turning point of the Civil War was the Union's capture of Forts Henry and Donelson in February of 1862, seven months after the start of the Civil War. The Union was not capable and underestimated the threat in the beginning of the Civil War justifying the highest placement on the scale.

In all, the act of suspending habeas corpus received the highest score, 15, on the necessary scale. From the score, it can be concluded that extreme action was necessary for the Union to put the country's security over the American citizen's civil liberties for the threat of Civil War. While this act directly opposed the fundamentals of the Constitution, to President Lincoln, the destruction of the United States far outweighed the preservation of civil liberties. From the analysis and the score, it is evident that it was necessary to suspend the writ of habeas corpus in order to preserve the security of the nation.

6.2 Espionage and Sedition Acts (1917)

The Espionage and the Sedition Acts were controversial events that blurred the line between individual rights of U.S. citizens and national security. While the aim of the Espionage and Sedition Acts was to prevent interference of military affairs, insubordination, and support the U.S. war efforts during WWI, both acts placed heavy restrictions on a range of actions, most notably the freedom of speech, for U.S. citizens.¹⁰⁰ Some of the most notable restrictions included: the authority to ban newspapers as well as magazines that oppose the draft, threaten and jail people for up to 20 years who would obstruct the draft or openly oppose the war, and quell public disorder or protests against the war efforts.¹⁰¹ Both acts were only meant to apply “when the United States is in war” and were upheld in the Supreme Court under *Abrams v. United States*. Giving the majority opinion, Justice Clarke wrote that *Abrams* anti-war leaflets “...demonstrated an intent to hinder production of war material and could not be characterized as simple expression of political opinion.”¹⁰² Was it necessary for the government to suspend free speech “when the United States is in war” in order to bolster war efforts?

The threat to the nation, in this case, was the threat of the German armed forces against America. On January of 1917, President Wilson told a joint session of Congress that the U.S. would remain neutral in WWI.¹⁰³ What ultimately tipped the scale and triggered President Wilson to recant his statement and ask Congress to declare war was the series of German U-boat attacks that threatened the nation. Germany’s unrestricted submarine warfare ultimately killed hundreds of U.S. civilians, most notably the 128 Americans that were killed in the sinking of the

¹⁰⁰ Davis, A. "Freedom of speech in times of war: the sedition act of 1918." *Social Education* 79, no. 3 (2015): 125-129.

¹⁰¹ *Ibid*, 127.

¹⁰² *Ibid*, 129.

¹⁰³ *Ibid*, 129.

RMS Lusitania.¹⁰⁴ Despite the attacks, the threat to the nation was scored as a two on the necessary scale as the threat to the nation as a whole was severe. President Wilson further proved this point when he signaled that the United States would stay out of the war as long as the Germans did not target American vessels.¹⁰⁵ Some historians argue that the Zimmerman Telegram presented a direct threat to American sovereignty however, Mexico determined that an attack on the U.S. was neither possible nor desirable and while concerned, President Wilson's actions stopped at proposing to Congress that the U.S. should start arming its ships against possible German attacks.¹⁰⁶ It is evident through the President's actions that the severity of the threat to the nation was not high.

The imminence of the threat can be analyzed from the unrestricted maritime warfare that Germany was conducting. In early May of 1915, the New York newspapers published several warnings from the German embassy in Washington that Americans traveling on ships in war zones "did so at their own risk."¹⁰⁷ While there was concern that an event could happen, the U.S. was not deterred by this threat and published an advertisement for the imminent sailing of the British vessel, the Lusitania, on the same page. Ultimately, Germany sunk the Lusitania, killing 128 Americans however, when discussing the imminence of this threat, we are looking at the likelihood that the threat would occur shortly after the threat was identified. At the time, American opinion was not swayed by the threat as it seemed unlikely that a German attack would occur. As a result, the imminence of the threat was rated as a two on the necessary scale as the U.S. had time to react and prepare for the threat. While the threat did occur shortly after the newspapers reported it, the decision to ignore the threat and place no restrictions on warnings

¹⁰⁴ R.H. Gibson, Maurice Prendergast, *The German Submarine War 1914-1918*, Periscope Publishing, 2002, p. 135

¹⁰⁵ *Ibid*, 137.

¹⁰⁶ *Ibid*, 137.

¹⁰⁷ *Ibid*, 142.

on U.S. maritime travel demonstrates that the U.S. was not concerned with the timeliness of a threat that may or may not happen.

The ability for the U.S. to counter the threat was high and therefore scores a two on the necessary scale. The U.S. was well aware of the threat, acknowledged that something could happen, and chose to maintain neutrality. There were several measures the U.S. could have taken in order to limit the threat against the American people from the German U-boats. Due to the low severity of the threat and the lack of immanence of the threat, the need to put measures in place to counter the threat was also low.

In all, the Espionage and Sedition Acts scored six out of 15 on the necessary scale meaning, the government's actions can be considered questionable as the need for both acts was not justifiable for the threat. Despite the Supreme Courts concurrence with the acts and the self-imposed restrictions on when the acts can be enforced by the government, the threat did not justify the government's actions to essentially suspend first amendment rights.

6.3 Japanese Internment Camps (1942)

Through Executive Order 9066, the then US President Franklin Roosevelt ordered the establishment of the Japanese internment camps from 1942-1945 with the intention of preventing espionage on the continental United States.¹⁰⁸ According to the order, all people of Japanese descent in the US would be interred in isolation camps in either California, Washington, or Oregon which were states with the largest population of Japanese Americans.¹⁰⁹ A key term in this discussion is the internment of Japanese Americans which meant U.S. citizens, protected

¹⁰⁸ Wendy, L. Japanese American Internment During World War II: A History and Reference Guide. New York: Wiley Press, 2002.

¹⁰⁹ Ibid, 67.

under the U.S. Constitution, were persecuted because of their Japanese heritage. In all, over 120,000 Japanese Americans were detained by the military where Japanese Americans were surrounded by barbed wire and armed guard towers.¹¹⁰

The threat to the nation, for this event, is the threat of espionage by the Japanese against America which was the reason for the internment camps. For the first time in U.S. history, a foreign nation attacked U.S. soil and did so with surprise, precision, and coordination. Undoubtedly, tensions were high in the U.S. and the need to secure the country was at the utmost priority to the President. At the time, President Roosevelt and his top advisers uncovered secret decoded Japanese cables that were used for espionage.¹¹¹ It was estimated that there were hundreds if not thousands of Japanese spies throughout the West Coast of the United States and that some of these spies helped coordinate the attacks on Pearl Harbor.¹¹² The threat against America was palpable however, the act of espionage is not great enough of a threat to justify more than a two on the necessary scale. While Imperial Japan presented a serious threat to the sovereignty of America, the threat of espionage by Japanese Americans, which is the threat being analyzed here, was not great enough to say it threatened the existence of the U.S.

The immanence of the threat received a four on the necessary scale as there was credible information that the Japanese were actively plotting against the U.S. through use of these spies. Cables intercepted by the U.S. in 1941 show that the Japanese were actively recruiting and using spies to gather intelligence on the U.S. In one cable, the Japanese wrote: “we have already established contacts with absolutely reliable Japanese in the San Pedro and San Diego area, who

¹¹⁰ Ibid, 72.

¹¹¹ Japanese Americans From Relocation to Redress. Daniels, Roger, Sandra Taylor, Harry Kitano. Seattle Washington. University of Washington Press, 1991.

¹¹² Ibid, 28.

will keep a close watch on all shipments of airplanes and other war materials, and report the amounts and destinations of such shipments.”¹¹³ Another intercepted cable showed the Japanese were even interested in sending spies through the American military as they wrote: “for the future we have made arrangements to collect intelligence from the second-generation Japanese draftees on matters dealing with troops as well as troop speech and behavior.”¹¹⁴ It is evident through these intercepted cables that there was a strong likelihood that the threat of espionage would occur in the near future from these cables. While it is unclear how much intelligence the Japanese spies were able to collect, it is clear that the threat was imminent giving the actions of the government more justification on the necessary scale.

The ability to counter the threat of Japanese American espionage is difficult to assess. On one hand, it is difficult to determine who is really a spy vs. the average citizen. On the other hand, the U.S. had ways and means to protect the continental U.S. from espionage. The Office of Strategic Services, or OSS, was established in July of 1941 to combat the concerns on American intelligence. The OSS executed a number of missions and was given very large left and right limits that included the ability to sabotage, waging war propaganda, providing military training for anti-Japanese guerrilla movements, amongst many other things.¹¹⁵ While it was disbanded at the conclusion of the war, the OSS was seen as a success on America’s ability to conduct counter intelligence and counter espionage. Former CIA director, David Petraeus, wrote “the concepts pioneered by General Donovan and the OSS continue to guide those in the

¹¹³ G.J.A. O’Toole, *Honorable Treachery: A History of U. S. Intelligence, Espionage, and Covert Action from the American Revolution to the CIA* pp 418

¹¹⁴ *Ibid*, 422.

¹¹⁵ *Ibid*, 440.

contemporary intelligence and special operations field.”¹¹⁶ Through these ways, it can be determined that while difficult, the U.S. was equipped to counter the espionage threat.

Overall, the Japanese internment camps of WWII scored an eight on the necessary scale. The score sits in the middle of the scale showing that while action of necessary from the government, the use of internment camps was questionable and could have been avoided. However, when faced with the conflict of civil liberties or national security, the Japanese internment camps demonstrate that the government will side on national security as extreme actions were deemed necessary although questionable.

6.4 Youngstown Sheet Case (1952)

The *Youngstown Sheet & Tube Co. v. Sawyer* was a landmark Supreme Court case that set conditions on the powers of the President of the United States. In 1950, the U.S. became involved in the Korean War through President Truman’s war powers. At the time, President Truman was concerned that the nation’s steel mills would not be able to produce enough steel to support the war effort as the talk of strikes across the steel mills was increasing.¹¹⁷ Steelworkers were asking for a new contract that would increase their wages while steel mill managers were staunchly opposed. The tipping point occurred in April of 1952 where the union announced they would go on strike forcing the steel mills to shut down without any workers.¹¹⁸ President Truman decided that his only option was to force the steel mills to stay open and ordered the seizure of steel mills to be under federal control where he can determine output, prices, etc.¹¹⁹ While not unprecedented, the federal seizure of the steel mills to support the war efforts

¹¹⁶ Ibid, 444.

¹¹⁷ Schwartz, B. "Inherent executive power and the steel seizure case: a landmark in American Constitutional law." *Can. B. Rev.* 30 (1952): 466

¹¹⁸ Ibid, 467

¹¹⁹ Ibid, 467.

questioned the powers of the President. Powers in which President Truman thought it was necessary to enforce.

The threat in this situation was losing the war in Korea as a result of steel shortages and not being able to support the war efforts. As President Truman put it, the stoppage “would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field.”¹²⁰ While President Truman is accurate in his statement on the jeopardy to our war fighters, it can be argued that the jeopardy to the nation was minimum to none. North Korea’s goal during the Korean War was to turn the entire state of Korea into a communist nation. There were no plans to expand, conquer, or push their agenda to the United States. For this reason, the threat to the nation was given a score of one on the necessary scale. While running out of steel would be an embarrassing black eye to the U.S. and put the war fighters in danger, there was no threat to the existence of the United States or mainland United States if steel were to run dangerously low.

The imminence of the threat was also given a score of one on the necessary scale. While there was no threat that was directly communicated to the U.S., the outbreak of war will always put a target on a nation by proxies or sympathizers. However, as stated before, the threat was insignificant therefore, the imminence of a national security crisis event occurring against the U.S. as a result of a steel shortage is little to none. This is further proved in the fact that the Supreme Court sided with the steel companies and the Korean War ended in a stalemate with no damage to mainland U.S.

¹²⁰ Ibid, 470.

The U.S. had every capability to counter North Korean aggression against the United States. While the shortage of steel was a detriment to the war efforts, the primary goal of the U.S. was to protect South Korea and prevent it from turning Communist which was achieved. While some military leaders, like Douglas MacArthur, were looking to push through North Korea, America did not have the appetite for war in the Korean Peninsula; a war where President Truman did not ask Congress for permission in sending troops. As a result, the ability to counter the threat is a one on the necessary scale. The U.S. was short on steel but, had all other means to accomplish their agenda and keep the homeland safe.

In all, the seizure of the steel mills by President Truman receives a three out of 15 on the necessary scale. The government's actions to expand the President's powers and seize private businesses was not justified according to the threat. This point is further proved in the Courts decision to side with the steel companies and limit the President's power. There was no effect to homeland America because of the courts decision further proving that President Truman's actions were not necessary in choosing national security over civil liberty.

6.5 The US Patriot Act (2001)

Following the 9/11 attacks on the World Trade Center in 2001, Congress approved President Bush's radical Patriot Act which was meant to bolster national security. The Patriot Act allowed for massive revision of the national surveillance laws, which would expand the authority of the government significantly to spy its citizens, and reduce the possible checks and balances regarding the utilization of such powers.¹²¹ Some of the powers of the government under the Patriot Act is the ability for the government to conduct record searches of citizens

¹²¹ Smith, Cary S, and Li-Ching Hung. The Patriot Act: Issues and Controversies. Springfield, Ill: Charles C. Thomas Publisher, 2010.

without a warrant, searches of property and persons who are under “suspicion” of terrorist activity, intelligence searches that were meant for foreign adversaries but used for American citizens, and “trap and trace” searches that collect information about the origin and destination of communications such as emails and texts.¹²² All of these expanded privileges under the Patriot Act, and many more, violated the fourth amendment of the Constitution. How necessary was the Patriot Act in securing the country at the cost of fundamental civil liberty rights?

“Today, our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts.”¹²³ In his first words to the nation following the terrorist attack that changed the nation, President Bush made it clear that the America was facing a threat that exposed a vulnerable side of America that the world has not seen since Pearl Harbor. While the threat of terrorism on and following 9/11 changed not only America but, the world as we once knew it, the threat of terrorism did not, and still does not today, threaten the existence of the United States. For this reason, the threat of terrorism is given a four on the necessary scale. It is a global threat that severe enough to draw America into the longest war in her history but, there is no threat that al-Qaeda, ISIS, or any other terrorist affiliates would be capable of overthrowing the nation or cause the destruction of the United States.

The imminence of the threat is difficult to justify. It is difficult, if not impossible, to determine the risk or occurrence of a terrorist attack. There is always a chance that a threat can be under or overestimated, both of which may have dire consequences. Looking at the 9/11 attacks prior to when they happened, the imminence would have been determined to be low. As reported in the 9/11 Commission Report, part of the failure of the intelligence community was

¹²² Ibid, 67.

¹²³ Cover, Avidan Y., "Presumed Imminence: Judicial Risk Assessment in the Post-9/11 World" (2014). Faculty Publications. 1418.

that no one thought al-Qaeda could accomplish such a task despite several reports that an attack was imminent. However, the Patriot Act was enacted following the 9/11 attacks therefore, imminence for this section is defined as post 9/11 presumption of imminence which differs from the precautionary imminence in that it defies quantifiable risk assessment. In other words, no one wanted to be wrong again therefore, every threat was considered credible, actionable, and addressed despite the slightest shred of evidence surrounding the threat. Following this logic, imminence of the threat is given a five on the necessary scale. The fear that another terrorist attack could occur at any time, any location, and by anyone made the tension in the country palpable. It is logical to conclude that any threat that was intercepted by the intelligence community post 9/11 was taken with the utmost seriousness and assumed to be credible and imminent.

America showed great ability to counter the threat post 9/11. Within days, airport security and most public transportation services changed their security posture in order to better screen passengers.¹²⁴ Military bases were closed to public access and required military identification for access.¹²⁵ The Department of Homeland Security hired Federal Flight Deck Officers who were armed federal agents that would take random flights and were authorized to use deadly force if another attack were to happen.¹²⁶ The U.S. military received the largest funding increase in history and was put on notice that our retaliation was imminent.¹²⁷ America's ability to regroup, lockdown the country, and project power overseas demonstrates the ability the country had to counter the threat. Therefore, the ability to counter the threat is at a two on the

¹²⁴ Ibid, 1418

¹²⁵ Ibid, 1418

¹²⁶ Ibid, 1418

¹²⁷ Ibid, 1418

necessary scale. This means that the country was prepared to counter the threat however, the threat was so dynamic and fluid that completely stopping it was impossible.

The necessity of the Patriot Act scores a 12 of 15 on the necessary scale. Sen. Mitch McConnell, R-Ky., said in Congress in April 2004 that “the biggest hero to emerge from the hearings before the 9/11 Commission has been the Patriot Act.”¹²⁸ In March 2006, President George W. Bush credited the Patriot Act with helping “break up terror cells in Ohio, New York, Oregon and Virginia.”¹²⁹ We’ve stopped 28 terrorist attacks since 9/11,” said James Carafano, a homeland security expert at the Heritage Foundation, four years later. “The Patriot Act has been a big part of that.”¹³⁰ It is undeniable that the Patriot Act sacrifices certain civil liberties at the altar of national security. However, the necessity of such extreme action to preserve the security of the nation in the face of an unprecedented extremist threat proved to be greater than the need to preserve the civil liberties of individuals.

6.6 Detention of Yaser Hamdi (2004)

Following the 9/11 attacks, the United States saw an increase of Muslim Americans and other American sympathizers who chose, on their own accord, to leave the U.S. and join the terrorist organizations overseas. Yaser Hamdi was an American citizen, born in Baton Rouge, Louisiana, who was captured in Afghanistan fighting with the Taliban in 2001.¹³¹ The U.S. government claimed that Hamdi was an enemy combatant actively fighting against the U.S. therefore, he has lost his rights as an American citizen to include habeas corpus.¹³² Serving a

¹²⁸ Hudson, D. L. (2012). Patriot Act. Freedom Forum Institute. Retrieved from <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/libraries-first-amendment-overview/patriot-act/>

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Amy Kalman and Chris Schroeder. "Hamdi v. Rumsfeld": Americans Captured on the Battlefield Can Be Detained Without Criminal Charges — But They Are Entitled to a Hearing". Duke Law Commentary. p. 8.

¹³² Ibid, 12.

total of three years between Guantanamo Bay and various super max prisons in the U.S., the U.S. government declared Hami an enemy of the state and said that he has forfeited his rights as an American citizen. Hamdi's family then filed a court order declaring that Hamdi's rights as an American citizen were being violated as he was offered no counsel and no trial for all three years of his incarceration; essentially holding him in prison indefinitely.¹³³ Hamdi's case reached the Supreme Court in 2004 where it was decided that the U.S. government has the power to detain enemy combatants, to include U.S. citizens, however, U.S. citizen detainees must have the right to due process and the ability to challenge their enemy combatant status.¹³⁴ As organizations like ISIS and affiliates continue to emerge and Western sympathizers join the cause, was the detention and suspension of rights for Hamdi and citizens like him necessary in order to ensure the safety of the nation?

The threat to the nation is the act of terrorism against the U.S. However, in this case, the argument is focused around those that willingly choose to leave the country and fight overseas therefore, moving the threat from the homeland to a different part of the world. While the threat that pose to Americans overseas is high, the threat to the nation is low as the likelihood that they would be able to return to the U.S. and carry out an attack is little to nonexistent. Nevertheless, former Western citizens turned Islamic extremists have been known to recruit followers from back home and call for Jihad to take place in their home country. This most notably occurred with a man named "Jihadi John;" a U.K. national who appeared in several ISIS videos beheading and spewing ISIS propaganda before he was killed. For this reason, the threat to the nation is rated as a two on the necessary scale. The threat exists through means of recruitment and

¹³³ Ibid, 20.

¹³⁴ Ibid, 22.

possible inspired lone wolf attacks back in the U.S. however, these are threats that do not come close to the destruction of the U.S.

The imminence, or likelihood that the threat would occur shortly after the threat was identified, in this case is minimum and given a one on the necessary scale. Between ISIS, al-Qaeda, and other affiliates, threats, and messages to attack the U.S. are made often. Every year, on the anniversary of 9/11, the al Qaeda leader, al-Zawahiri calls for all Muslims to attack U.S., Europe, and Israel.¹³⁵ While attacks have occurred on the anniversary of 9/11, most notably the storming of the U.S. embassy in Libya that left several Americans dead, only 80 people have been charged with terrorist activity between 2015 and 2020 in the U.S.¹³⁶ While security measures always increase around the anniversary of 9/11 and when terrorist propaganda calls for attacks, the likelihood that a significant attack will occur on American soil is very little.

At the time of Hamdi's detention, the ability for the U.S. to counter the threat was relatively high. The U.S.' counterterrorism efforts outpaced our allies and adversaries and continues to do the same today. Again, on the necessary scale, the closer the number is to zero, the more capable the country was to counter the threat. Therefore, the ability to counter the threat of citizens turned extremists is a two on the necessary scale. The U.S. has the capabilities to track and surveil potential terrorist threats, thanks to acts like the Patriot Act, which allow the U.S. to get ahead of potential sympathizers. It is estimated that some 300 Americans attempted to join ISIS which shows that the threat still exists however, all of these individuals are tracked, identified, and have limited capabilities in ever causing harm to the U.S.¹³⁷

¹³⁵ Ibid, 30.

¹³⁶ Ibid, 30.

¹³⁷ Koerner, Brendan I. "Why ISIS Is Winning the Social Media War." *Wired*, Conde Nast, 1 May 2017

The detention of Yaser Hamdi receives an overall four on the necessary scale. While citizens turned extremists like Hamdi present a security threat to the nation, the indefinite detention of U.S. citizens turned enemy combatants is not necessary when applying the necessary scale factors. In this case, the civil liberties granted to U.S. citizens demands that Hamdi and others like him must either have Congress suspend the right to habeas corpus or must be tried under normal criminal law.¹³⁸

6.7 Killing of Anwar al-Awlaki (2011)

Anwar al-Awlaki, a U.S. citizen born in New Mexico, became a prominent imam, recruiter, and motivator for al-Qaeda.¹³⁹ Al-Awlaki has been tied to preaching to three of the 9/11 hijackers, presiding over the funeral of over the mother of the Fort Hood shooter, and inspiring and aiding in the planning of the underwear bomber plot in 2009.¹⁴⁰ Suspected to be a regional commander for the al-Qaeda in the Arab Peninsula, Awlaki's location was tracked in Yemen where he became the first U.S. citizen to be killed by drone strike without the rights of due process. While Awlaki shares many similarities to the previously discussed Hamdi, his position within the al-Qaeda hierarchy and direct contribution to terrorist plots and executions places Awlaki in a different zone than Hamdi. This begs the question: do the actions and rank of U.S. citizens turned extremists nullify the ruling of Hamdi's case and make it necessary to kill those individuals without due process?

With certainty, Awlaki presented a threat to the United States through his teachings, sermons, and planning for al-Qaeda. While this threat was real and inspired others to commit

¹³⁸ Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law: Sixteenth Edition* (Foundation Press: New York, 2007) 273.

¹³⁹ Meleagrou-Hitchens, Alexander. *Incitement: Anwar Al-Awlaki's Western Jihad*. Cambridge, Massachusetts: Harvard University Press, 2020. p. 67

¹⁴⁰ *Ibid*, 72.

terrorist actions against the U.S., the harm Awlaki caused was not enough to say that the entire U.S. was in danger. Awlaki repeatedly called for Jihad against America however, the only known affiliate to contribute direct inspiration to Awlaki was the underwear bomber, Abdulmutallab.¹⁴¹ While Abdulmutallab's actions would have been devastating if he was successful, to say that Awlaki's influence threatened the entire nation is reaching. As a result, the threat to the nation is given a two on the necessary scale. The threat existed, as evident by Abdulmutallab, and while the underwear bombers actions forever changed the policies of air travel, Awlaki's influence was not great enough to argue that the country was at serious risk of mass destruction.

Between 2005 to his death in 2011, Awlaki's name was mentioned a dozen times in connection to terrorist plots in the U.S., U.K., and Canada.¹⁴² While Awlaki only had a direct hand in the underwear bomber plot, the 2005 London Bombings, 2006 Toronto Terrorism Case, 2007 Fort Dix Attack Plot, 2009 Little Rock Military Recruiting Office Shooting, and 2010 Time Square Bomber all cite Awlaki's preaching as inspiration for their attacks.¹⁴³ While all of these attacks were within their local areas, the frequency in which Awlaki would release a message and an attack would occur is very close. For this reason, the imminence of the threat receives a four on the necessary scale as Awlaki's threats against the U.S. were cited in a terrorist act every year until his death. It is reasonable to conclude that Awlaki's influence, although not strong enough to put the entire country on lockdown, was serious enough that we could expect an attack of some kind to occur following his message.

¹⁴¹ Ibid, 82.

¹⁴² Ibid, 89.

¹⁴³ Ibid, 90

The ability of the U.S. to counter the threat Awlaki posed receives a three on the necessary scale. Where Awlaki's case differs from Hamdi is that Awlaki was protected by his first amendment rights to give sermons and spread his propaganda influence through CDs and other mediums online. While Awlaki's movements and speech was always being tracked by the government, they were powerless to take action which allowed Awlaki to do as he pleased in the U.S. from his first affiliation with the Taliban in 1993 until he left the states in 2002.¹⁴⁴ Although the U.S. possessed all of the means and ways to counter Awlaki, they were inhibited from acting which severely decreased their ability to counter the threat until the order was given to kill Awlaki.

Awlaki's case receives an overall score of nine out of 15 on the necessary scale. Awlaki's power and influence in al Qaeda made him a serious threat around the world. Unlike Hamdi, Awlaki's ability to influence actionable events while being protected by the Constitution made it necessary that action was taken to quell the threat. Whether that necessary action should be death or other means to capture is a topic of debate that Awlaki's family is still arguing today however, Awlaki's score in the necessary scale concludes that it was necessary to suppress Awlaki's civil liberties in order to ensure the safety of the nation and her people.

6.8 Questioning of the Boston Bomber (2013)

Dzhokhar and Tamerlan Tsarnaev gained notoriety in 2013 when they planted a series of pressure cooker bombs at the Boston Marathon and killed a security guard in their attempt to escape.¹⁴⁵ After Tamerlan was killed in a shootout with the police, and ran over by his brother attempting to flee, Dzhokhar took refuge in a boat that was parked in the driveway of a

¹⁴⁴ Ibid, 77.

¹⁴⁵ Chappell, Bill. "The Tsarnaev Brothers: What We Know about the Boston Bombing Suspects: The Two-Way". NPR.

Watertown, MA resident.¹⁴⁶ Dzhokhar was eventually found, captured, and received medical treatment for numerous injuries he sustained in the shootout and chase. While in his hospital bed, Dzhokhar was questioned for 16 hours by investigators before he was read his Miranda Rights. Following his Miranda warnings, Dzhokhar refused to speak any further to investigators and asked for a lawyer. Whether Dzhokhar's testimony prior to the Miranda warnings was admissible was highly contested. The U.S. government claimed that Dzhokhar was an unlawful enemy combatant rather than a criminal therefore, his right to legal counsel was forfeited. In the end, Dzhokhar's interrogation was not used by prosecutors as it did not further their case however, the government did argue that they should be able to use it as it fit the stipulations under the public safety exception. This loophole would have allowed the government to use Dzhokhar's statements despite not having his Miranda warnings. While the statements were not used in Dzhokhar's trial, should the government have to find loopholes to protect the country when a domestic terrorist attempts to or successfully causes mass destruction? Or is it necessary that certain rights are suspended to make it easier to ensure the security of the nation?

Similar to Hamdi and Awlaki, Dzhokhar's threat to the nation as an individual is minimum. While he did cause the death of three civilians and injured 264, his attack was isolated to the Boston area and there was no indication that the country as a whole was under attack. Dzhokhar's actions should not be taken likely however, he has received a one on the necessary scale due to the fact that his attack was constrained to one city in the U.S., he had no capabilities or means to inflict further damage, and he was captured within hours of his attack. The threat to the nation as a whole was minimum to none.

¹⁴⁶ Ibid.

The government argued that Dzhokhar's testimony, prior to his Miranda warnings, fit the stipulations under the public safety exception. This meant that certain unadvised statements, given without Miranda warnings, are to be admissible into evidence at trial when they were elicited in circumstances where there was a great danger to the public safety. While the statements proved to be no value to the prosecution's case, legal scholars argue that the government would have won the argument and used the testimony under the public safety exception.¹⁴⁷ For this reason, the imminence of the threat around this case receives the highest score, five. While the threat was isolated to the Boston area, the possibility that there were coconspirators, follow-on attacks, or bombs planted in other areas on timers was plausible. Furthermore, in October 2010, the FBI issued a guidance for how to apply this "public safety exemption" to terrorism suspects. The memo noted that "an arrest of an operational terrorist may warrant significantly more public safety interrogation than ordinary criminal cases."¹⁴⁸ The reason behind this decision was that terrorist actions were too unpredictable, dynamic, and fluid to assume that there is only one single and isolated attack. The 9/11 attacks involved four aircrafts with four original targets. The 2015 Paris attacks were six different coordinated attacks that occurred simultaneously. It is reasonable to conclude that there was an imminent threat following the Boston Bombings and it was necessary to suspend civil liberties in order to confirm or deny that possibility.

Similar to the arguments used for Hamdi and Awlaki, the ability for the U.S. to counter a terrorist threat is great. While the brothers were able to execute their attack, the swift action of the Boston PD, FBI, and counterterrorism task force was able to gain control of the situation

¹⁴⁷ Johnson, Luke (April 22, 2013). "Dzhokhar Tsarnaev Receives Miranda Rights after Delay for Public Safety Exception". Huffington Post.

¹⁴⁸ Ibid.

within hours. For this reason, and due to the fact that the attack was successful, this case receives a one on the necessary scale indicating that the U.S. had the ways and means to counter the threat after it was initiated.

The suspension of Dzhokhar's rights in order to ensure the safety of the public receives an overall seven out of 15 on the necessary scale. While the government would have been successful in arguing the public safety exception to make Dzhokhar's testimony admissible, it is difficult to argue that their actions were completely necessary according to the necessary scale. Although terrorism is a dynamic and complex threat, intelligence, at the time, did not support the notion that there were going to be further attacks. There was reasonable suspicion that Dzhokhar and his brother could have planted more bombs elsewhere which calls for action to be taken in order to ensure the safety of the country and her citizens however, for this case, reasonable suspicion falls on the lower end of the threshold for necessary for the government's actions.

6.9 "Trump Travel Ban" (2017)

In March of 2017, President Trump signed Executive Order 13780 titled: Protecting the Nation from Foreign Terrorist Entry into the United States.¹⁴⁹ The executive order places limits on travel to the U.S. by nationals of several countries, mostly countries of Muslim background.¹⁵⁰ The goal of the travel ban, also known as the "Muslim Ban" by popular media outlets, is to protect the U.S. and her citizens from countries that are known to have or harbor extremist activity or resentment towards the U.S. While the travel ban is focused around non-American citizens entering the country, the travel ban was challenged by the courts for violating

¹⁴⁹ Zapotosky, Matt; Nakamura, David; Hauslohne, Abigail (March 6, 2017). "Revised executive order bans travelers from six Muslim-majority countries from getting new visas". The Washington Post.

¹⁵⁰ Ibid.

the establishment clause of the Constitution. The relevant Constitutional text is: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...”

¹⁵¹ The argument is that the travel ban targets those of Muslim background therefore, it is unconstitutional to enforce such a law. As tensions increase with countries like North Korea, Iran, and Syria, all countries on the travel ban, at what point is it deemed necessary that we take extreme actions to ensure that those threats never reach American shores?

The threat to America in this case is the possibility of terrorism or espionage from America’s foreign adversaries. Between 2017 and 2020, there were 15 successful terrorist attacks in the United States where only three of the 15 attacks were executed by a non-U.S. born citizen.¹⁵² Additionally, while the cases of espionage against the U.S. has gone up in recent years, the vast majority of those cases come from foreign adversaries using cyberwarfare, not sending physical spies to the country.¹⁵³ While the potential for a threat is great, the statistics do not support anything above a one on the necessary scale for the threat to the nation. Domestic terrorism and cybercrimes continue to expose vulnerability gaps in the U.S. national defense plan. It is reasonable to conclude that rogue North Koreans, Syrians, and Iranians are not a significant threat to the survival of the United States.

The imminence of the threat is little to none. While it is hard to measure the success of the travel ban, statistically, the actionable threats to America are not coming from rogue refugees or spies from foreign adversaries. Of the three non-U.S. born citizens that executed successful terrorist attacks on the U.S. between 2017 and 2020, none of them would have been prevented a

¹⁵¹ Lietzau, William K. (1990). "Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation". DePaul L. Rev. 39 (1191).

¹⁵² Cai, Weiyi; Landon, Simone (April 3, 2019). "Attacks by White Extremists Are Growing. So Are Their Connections". The New York Times. The New York Times.

¹⁵³ Ibid.

visa to the U.S. under the travel ban as they are from countries not on the list.¹⁵⁴ The notion that there is an imminent threat from people trying to enter the country from the list of banned countries is farfetched. Therefore, the imminence of the threat in this case is a one on the necessary scale.

The ability for the U.S. to counter the threat is extremely great. The U.S. is well known to have some of the strictest restrictions on visas and immigration. Background checks are extensive, and any indication of terrorism or state supported activity against the U.S. results in immediate disqualification. It is reasonable to conclude that the likelihood that a foreign adversary on the list of the travel ban would have a significantly challenging time entering the U.S. As a result, the ability to counter the threat for this case is a one on the necessary scale indicating that the U.S. has all of the ways and means available to counter the threat.

Overall, the travel ban fails to meet the threshold of necessary on the necessary scale as it scores a three out of fifteen. The threat is limited, the imminence of a threat is almost non-existent, and the ability for the U.S. to get ahead of any potential threats from refugees or immigrants from these banned countries is high. The travel ban is an unnecessary protective measure that provides a false sense of security while violating several Constitutional rights.

6.10 COVID-19 Government Restrictions (2020)

COVID-19 or the Corona Virus, is a respiratory illness that has turned into a global pandemic originating from China.¹⁵⁵ According to the Johns Hopkins University of Medicine COVID dashboard, there are 3.9 million cases of Corona Virus with 1.2 million of those cases in

¹⁵⁴ Ibid.

¹⁵⁵ "Coronavirus Disease 2019 (COVID-19) Situation Summary". CDC. March 7, 2020.

the U.S.¹⁵⁶ Additionally, there are nearly 77,000 deaths in the U.S. from Corona Virus, surpassing deaths caused from the common cold and the flu.¹⁵⁷ In response to the high volume of cases in the U.S., President Trump's administration, working with state governors, issued several restrictions preventing people from going to work, gathering in large groups, and going to public places such as restaurants, parks, and malls to name a few.¹⁵⁸ As America enters almost two months of isolation and quarantine, people are taking to the streets to protest the lockdown and blatantly disobeying the government's orders. Despite the government's attempts to "slow the curve" and keep Americans safe from the virus, people are arguing that these restrictions are violating their Constitutional rights. As the death toll continues to rise and the virus continues to spread throughout the U.S. how necessary was the government's quarantine procedures as civil liberties were put to the waist side in favor of America's health?

While the Corona Virus is not something that would destroy the nation, it is still one of the most significant threats to national security that the U.S. has seen in a long time. This is due to the fact that little is known about the virus and with no cure or vaccination in existence, anyone can get the virus where their symptoms and severity of their symptoms vary case to case. Furthermore, the Corona Virus has essentially put a stop to all military training, local businesses, and significantly hurt the American economy.¹⁵⁹ It can be argued that America, along with the rest of the world, is at its most vulnerable state. Accordingly, the threat to the nation is deemed a four on the necessary scale. While not enough to destroy the United States, the virus has decimated the economy, halted military operations, and essentially put America in a standstill.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Liptak, Kevin (March 16, 2020). "White House advises public to avoid groups of more than 10, asks people to stay away from bars and restaurants". CNN.

¹⁵⁹ Imbert, Fred (March 15, 2020). "Dow drops nearly 3,000 points, as coronavirus collapse continues; worst day since '87". CNBC.

The imminence of the threat of the Corona Virus is high. With the first news of the Corona Virus breaking out in January of 2020, at the time, the possibility that this would become a global pandemic was relatively low. This assessment is what many contribute to the failure of the U.S. response to the virus as this proved to be very wrong and the virus spread like wildfire around the world. From notification of the threat to today, numbers have skyrocketed beyond most projections and the top scientists warn that there will be another wave that will hit around the wintertime. As a result, the imminence of the threat is at a five on the necessary scale as the threat spread faster than anticipated and reach almost every continent in the world.

Called “the biggest failure to prepare the nation since 9/11” by The New York Times, the U.S. was ill prepared and slow to react to the Corona Virus.¹⁶⁰ With reports of the Corona Virus surfacing around January 2020, the official order to start social distancing did not arrive until sometime in March allowing the virus to spread for over three months. Hospitals were overwhelmed, stores were sold out of essential items, and conflicting guidance between President Trump’s team and medical experts left many confused on how to slow the spread.¹⁶¹ While the spread of the Corona Virus was inevitable, the amount of people affected and the countries reaction to the virus could have been better had the U.S. took extreme steps in the beginning when countering the threat. With no cure or vaccine available and America’s slow start to an adequate prompt response, this case receives a five on the necessary scale. This means that the U.S. did not have the means or capabilities to counter the threat once it was received or identified.

¹⁶⁰ McCann, Larry; Lai, Rebecca; McCann, Allison (March 17, 2020). "U.S. Lags in Coronavirus Testing". The New York Times. Retrieved March 25, 2020.

¹⁶¹ Smith, Michelle (March 22, 2020). "Chaos, Inconsistency Mark Launch of Drive-Thru Virus Testing". Associated Press. Retrieved March 30, 2020.

While protestors continue to march the streets and demand the country reopen, the government's response to the Corona Virus receives a 14 out of 15 on the necessary scale. While extreme, the actions the government took to slow the spread of the virus was necessary in ensuring the safety and wellbeing of Americans. The response to COVID-19 proves that the government is willing to suppress some basic freedoms to ensure the safety of the country when it is deemed necessary to do.

7.0 Presidential Review

7.1 Recent Statutes and Executive Orders

This chapter aims at reviewing executive orders and where the previous three Presidents, Trump, Obama, and G.W. Bush, have leaned on the scale of national security over civil liberties. While the three previous Presidents differ in their own ways, their actions and the precedent set by their actions can give a strong indication of what to expect for the future.

Executive order is defined in the United States Constitution as the directive that is being issued by the President for purposes of managing the operations in the federal government, while the statutes is simply the written law that has been passed by the legislative body with the goals of governing the federal, state, or the local governments.¹⁶² Article Two of the United States Constitution provides the President with the broad executive and enforcement authority towards using their discretion for determining the approach that could be taken in enforcing the law or in managing the resources and the existing staff at the executive branch. The Constitutional basis for issuing the executive orders can also be aligned to the implied Acts of Congress that is tasked with delegating to the President some levels of the delegated legislation. The two approaches form part of the legal or Constitutional basis that can be leveraged on as being the platforms for issuing the executive orders.

The legislative statutes and other forms of regulations that are issued by the government agencies together with the executive orders are always subject to judicial reviews and can thus be overturned if they lack the required support by the statute or from the outlines of the

¹⁶² Harn, R.W., and Sunstein, C.R. "A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis." *University of Pennsylvania Law Review*, 2002: 1489-1552. <https://www.jstor.org/stable/3312946>.

Constitution. The President of the United States is the only person who can issue the executive order, and it is important to identify with the fact that the executive orders acts as key towards influencing the internal affairs of the government with the acts such as dealing with the emergencies and other aspects that might influence the national security in the country.

The issue of executive orders by the President might end up prioritizing the aspects of the national security over the civil liberties of the individuals. Once the Presidential executive orders have been issued, then they might remain in force or can be revoked, canceled, ruled out to be unlawful, or they might expire depending on the terms of their issuance. This chapter will undertake the review of the recent statutes and executive orders in the United States from the Clinton era whose presidency started on 20 January 1993. Since then, the United States has had four Presidents each of whom has issued varied executive orders, but the review in this chapter will seek to discuss the ones that might have seemed to prioritize the U.S. national security over the civil liberties of the American citizens. The chapter will aim at meeting the specific objective of the paper that seeks to assess the influence of Presidential powers on national security law execution in the United States.

7.2 George W. Bush Era

George W. Bush was the 43rd President of the United States, and he served for two terms in office between 20 January 2001 and 20 January 2009 under the Republican Party. President Bush issued 291 Executive Orders throughout his two terms of presidency.¹⁶³ The notable aspect about his time in office is that the September 11 terrorist attacks occurred during his early days of presidency, and thus his two terms in office were majorly marked by the wars that were being

¹⁶³ Hilliard, B. George W. Bush: Evaluating the President at Midterm. New York: SUNY Press, 2012.

initiated and undertaken by the United States government mainly in Afghanistan and Iraq with the goals of countering the existing terrorism activities at the time. Even though neither of the wars had been resolved by the time when he left office in 2009, his term was marked by a number of executive orders that he issued some of which could be aligned to the violation of civil liberties for the American citizens in the name of prioritizing the national security.

The USA Patriot Act of 2001 acted as the executive order that was issued by President Bush at the time, and that particular U.S. legislation was passed by Congress as a response to the 9/11 terrorist attacks before being signed into law by the President. The Patriot Act in full stands for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.¹⁶⁴ The Act was signed into law by President Bush on 26 October 2001, and the legislation was passed with the sole purpose of strengthening the national security through the acts such as enhancing the ability of domestic security services for prevention of terrorism, enhancing surveillance procedures and border security, and focusing on removing the obstacles that might influence the investigation of terrorism activities amongst the other aspects.¹⁶⁵

The Patriot Act has received a wider criticism for its violation of the Constitutional rights for the American citizens. The Act has constantly been reviewed to significantly undermine the freedom of the individuals in the name of protecting the citizens from the global issue of terrorism. The Act allows the government to spy on the citizens without following the due process of law, and this entails the actions like searching of their homes without consent or legal

¹⁶⁴ Whitehead J. W., and S. H. Aden. "Forfeiting enduring freedom for homeland security: A Constitutional analysis of the USA Patriot Act and the Justice Department's anti-terrorism initiatives." *American University Law Review* 51, no.6 (June 2002): 1081-1133.

¹⁶⁵ Etzioni, A. *How Patriotic is the Patriot Act?: Freedom Versus Security in the Age of Terrorism*, 120. London: Routledge, 2005.

authority as stipulated in the Constitution.¹⁶⁶ The Act also increases the risks of the ordinary citizens turning out to be accused of varied crimes without the just cause through the process. The Patriot Act has proven to be a threat to the civil liberties of the American people, and since the Act served as a response to the 9/11 attacks, it extends to the history of the United States responding to varied aspects of attaining the national security by intruding and posing a gap to the bridge that is required for attaining the civil liberties of the people.

The Bush presidency was also marked by the other statutes and executive orders that were mostly aligned to what Bush had launched as the War on Terror. The response began with the war in Afghanistan, and it entailed the United States invasion of Afghanistan, which has now formed the longest war in the history of the United States. Bush had demanded for Taliban to produce Osama bin Laden where he claimed that he was hiding from and was wanted for the various attacks and atrocities, but Taliban refused to comply with the extradition of bin Laden with the claims that there were no clear evidence that showed his involvement in the attacks. Therefore, Bush proceeded with the attacks on Taliban claiming that the process was necessary as Taliban as a nation threatened the sovereignty of the United States and the other global states. The actions of Bush in ordering for the invasion of Taliban by the U.S. soldiers without sole evidence on the reasons for the attacks has been seen by many people as the violation of the civil liberties for majority of the affected individuals. A number of the executive orders were issued by President Bush during the period of the War on Terror, and an example includes Executive Order 13239 titled “Designation of Afghanistan and the Airspace Above as a Combat Zone.”¹⁶⁷ This particular executive order by President Bush acted as part of the numerous strategies that

¹⁶⁶ Ibid, 122.

¹⁶⁷ Hilliard, B. George W. Bush: Evaluating the President at Midterm. New York: SUNY Press, 2012.

were being established by the U.S. government at the time with the goals of providing the favorable platforms that would aid the U.S. soldiers in defeating the Taliban who were threatening the sovereignty of the nations. This amongst most of the other legislations that were made by President Bush at the time have been seen to violate the civil liberties for most individuals, and all these efforts have been undertaken with the national security being prioritized through the operational processes.¹⁶⁸

The War on Terror later expanded to include the Iraq war that began in 2003. The invasion was part of the response to the September 11 attacks that were being undertaken by President Bush, and this occurred after Congress had authorized President Bush to use military force against the Iraqi government if the situation made it necessary. Therefore, the U.S. joined efforts with the U.K. and the other coalition allies towards launching a series of the bombing campaigns that were aimed at overthrowing the Saddam Hussein government, which had been linked with supporting the terrorism activities. An estimated 150,000 to 600,000 Iraqis were killed through the conflict in the first three to four years of the attacks.¹⁶⁹ The Iraq war has been reviewed as having prioritized the national security of the United States and other global states with little consideration for the civil liberties of the individuals, and this has been evidenced by the price that was paid through the innocent lives that were lost during the war period.

7.2 Barack H. Obama Era

Barack Obama succeeded President Bush and became the first African-American President to be elected in the United States including being the first to be nominated under a major party which was on a Democrat ticket. Obama served for two terms, between 20 January

¹⁶⁸ Ibid, 97.

¹⁶⁹ Ibid, 140.

2009 and 20 January 2017, and through his presidency, he issued 276 Executive Orders majority of which had focused on prioritizing of the United States national security.¹⁷⁰ Through his presidency, the Iraq War came to an end, and the U.S. forces achieved the long pursued mission of killing Osama bin Laden. However, his term was also marked by the rise of the ISIL in less than a year after defeating the Al Qaeda missions, and the group later merged to form the Islamic State, which formed a great threat for the United States national security.¹⁷¹

Through his first term in office, Obama was engaged to the matters of national security from his involvement in the foreign policy aspects where he authorized for the increase of the U.S. troop levels in Afghanistan in the efforts of helping to back up the process that had been started by the previous administration which had been aimed at stopping the prevalence of the global terrorism activities. Based on the aforementioned analysis of the war on Afghanistan as it had been initiated by President Bush, the involvement of the U.S. had basically been a response to the 9/11 terror attacks, and majority of the decisions that had been made to have the U.S. troops involved in the invasion process had basically prioritized the matters of the national security over the civil liberties for majority of the individuals.

The New START treaty was undertaken through the presidency of Obama, and it formed a foreign policy initiative that was targeted at reducing the nuclear weapons between the United States and Russia.¹⁷² The New START treaty was signed and started being enforced on 5 February 2011 where it is expected to last at least up until 2021. The treaty was meant to undertake the measures that would help to further reduce and limit the strategic offensive arms

¹⁷⁰ Street, P. Barack Obama and the Future of American Politics. London: Routledge, 2015.

¹⁷¹ Shahzad, S. Inside Al-Qaeda and the Taliban: Beyond bin Laden and 9/11. Chicago: Pluto Press, 2011.

¹⁷² Street, P. Barack Obama and the Future of American Politics. London: Routledge, 2015.

which acted as threat to the national security of the involved nations. The enforcement of the treaty meant that a number of measures would be enforced including the new inspection and verification process for a number of the nuclear missile launchers that were being undertaken for each of the nations. This meant that the nations had prioritized on attaining their desired aspects of the national security at the expense of the aspects such as the civil liberties of the individuals that could be affected through the newly adopted system that was being enforced by each of the countries.¹⁷³

The Patriot Sunsets Extension Act of 2011 was also signed by President Obama through his presidency on 26 May 2011.¹⁷⁴ The main goal was aimed at providing a four-year extension to the three key provisions that had been made in the original Patriot Act that had been initiated in the aftermath of the 9/11 terror attacks which had formed a key terrorism legislation.¹⁷⁵ The extensions that were being provided in the outlines of the Patriot Sunsets Extension Act of 2011 included the roving wiretaps, the searches for business records, and the acts of conducting surveillance for the individuals who were being suspected of the linkage with the terrorist-related activities. The extension of the Act by President Obama translated to the fact that his government at the time was still involved in violating the Constitutional rights of the American citizens aligning with the move where the government could be involved and would spy on the citizens without their consent or following of the due process of law. The Act was an open violation of the civil liberties for majority of the American citizens basing on the fact that the law enforcers were allowed to search the homes or business premises of the suspected terror suspects, and that the search also included the telephone, e-mail, and financial records, which

¹⁷³ Ibid, 47.

¹⁷⁴ Ibid, 68.

¹⁷⁵ Ibid, 68.

were against the Constitutional provisions. This acted as an illustration of the open violations of civil liberties for the American citizens at the expense of the national security that was being prioritized by the government at the time.

The USA Freedom Act that was enacted on 2 June 2015 under the Obama presidency also acted as an illustration of the way the government handles the aspects of civil liberties for the American citizens in relation to the aspects of the national security.¹⁷⁶ President Obama signed the USA Freedom Act that was purposely meant to impose new limits to the bulk collection of the telecommunication metadata of the U.S. citizens using the American intelligence agencies including the involvement of the National Security Agency (NSA).¹⁷⁷ The Act could be seen as having been put in place to restore the expired parts of the Patriot Act, and part of its outlines also entailed restoring the use authorization for the roving wiretaps and tracking of the lone wolf terrorists.

The USA Freedom Act can be seen as having prioritized the importance of national security over the liberties of the American citizens. The outlines from the Act of giving more power to the United States intelligence agencies where they are allowed to use the bulk collection of the phone data from the American citizens acts as the move that has gone far beyond the outlines of the Constitution and overstepped on the original intent of the legislation. The violation of civil liberties has been evidenced by the fact that the government through the bodies like the NSA accesses the metadata from the phone companies which is an aspect that is impermissible by the law. Thus, such actions act as an indication on how the aspects concerning matters of national security are treated differently by the government as compared to the other

¹⁷⁶ Ibid, 97.

¹⁷⁷ Ibid, 102.

legal cases. The Fourth Amendment rights also challenges the outlines from the USA Freedom Act because it violates the part on the Bill of Rights that prohibits unreasonable searches and seizures. The rights provided in the Fourth Amendment also outlines that warrants should be issued in the cases that are justified by probable cause, and thus the USA Freedom Act seems to have violated this outline of the law; an aspect that affects the civil liberties of the affected people.

7.3 Donald J. Trump Era

Donald Trump is the current President of the United States under the Republican Party ticket, and he has been in office since 20 January 2017 after succeeding President Obama. This far, President Trump has issued 140 Executive orders with about one year remaining for his first term in office.¹⁷⁸ The Trump presidency has been marred with different controversies that have mainly been aligned to his autocratic form of leadership. The criticism of his leadership has majorly been aligned to being the first U.S. President with the lack of prior military or government service, and he has also been involved on numerous occasions in making false and misleading statements through his electoral campaign and presidency that have contradicted his leadership and political ideologies.¹⁷⁹

The Trump presidency has been marked by his orders on travel ban for citizens from majority of the Muslim countries citing the national security concerns. Trump issued Executive Order 13769 under the title of “Protecting the Nation from Foreign Terrorist Entry into the

¹⁷⁸ Esposito, L., and Finley, L. Political Correctness in the Era of Trump: Threat to Freedom or Ideological Scapegoat? Cambridge: Cambridge Scholars Publishing, 2018.

¹⁷⁹ Johnston, D.C. Making of Donald Trump, The. New York: Hardie Grant Publishing, 2018.

United States” and was popularly and politically labeled as the Travel ban or the Muslim ban.

The executive order came into effect from 27 January 2017, which was only a week after he had assumed office, and it was put in effect until 6 March 2017 after being blocked by several courts through its implementation process.¹⁸⁰ This particular executive order had an effect of lowering the number of refugees who were to be admitted to the United States by 50,000 alongside suspending the U.S. Refugee Admissions Program (USRAP) for 120 days; the program that had been designed to admit the qualified refugees in the affected countries for resettlement to the United States.¹⁸¹

The executive order on the travel ban acted as the open violation of the civil liberties for the affected American citizens with the government prioritizing on the importance of national security. The ban had resulted in the Department of Homeland Security (DHS) that listed and suspended entry of individuals from the countries that included Libya, Iran, Iraq, Somalia, Syria, Sudan, and Yemen. The act also resulted in more than 700 travelers being detained through the process including the provisional revocation of over 60,000 visas.¹⁸² The implementation of this executive order by President Trump could be seen as an open act of the violation of civil liberties for the affected individuals that were all undertaken at the expense of the government prioritizing on the aspects of national security. The process was also designated with little consideration being given to the Constitutional outlines that prioritized on the civil liberties of the citizens.

The RAISE Act was the bill that was introduced to the United States Senate in 2017 with the goals of seeking to reduce the levels of legal immigration to the U.S. by 50% through the

¹⁸⁰ Alihusain Candice, *The “US Travel Ban” from an International Law Perspective* (New York: Peace Palace Library, 2017), 9.

¹⁸¹ *Ibid*, 12.

¹⁸² *Ibid*, 13.

adoption of the strategy where the number of the green cards issued will be halved.¹⁸³ President Trump embraced the RAISE Act, which stands for Reforming American Immigration for a Strong Economy, and Trump reiterated that the support for the bill would be aimed at helping to support the aspects of the national security in the long run.¹⁸⁴ The outlines of the bill seek to attain the aspects such as drastically reducing the pathways for the family-based immigration, and replacing the current demand-driven model for the employment-based immigration with the use of the points system. The bill acts as an illustration of the moves that can be made by the government with the goals of prioritizing on the aspects of the national security for the country over the civil liberties of the affected individuals. The affected liberties of the individuals could be evidenced by the outlines of the bill that seek to introduce the dramatic change to the aspects of family immigration which acts as intrusion to the outlines on the bill of rights for the citizens.

The Trump presidency has also been marked by the proposed expansion of the Mexico-United States barrier through building of what has commonly been known as the Trump wall. Trump signed Executive Order 13767, which contained the directives that formally allows the U.S. government to begin the proposed construction of the wall along the Mexican border. The executive order that is titled “Border Security and Immigration Enforcement Improvements” can be seen as having the government prioritizing on the matters of national security at the expense of the individual liberties for the affected people.¹⁸⁵ The executive order relates to the Secure Fence Act of 2006 that was signed into law by the then President Bush who had authorized and partially funded the construction of the physical fence along the Mexican border with the goals of keeping away the illegal immigration that had resulted in threatening the U.S. national

¹⁸³ Ibid, 22.

¹⁸⁴ Ibid, 27.

¹⁸⁵ Esposito, L., and Finley, L. Political Correctness in the Era of Trump: Threat to Freedom or Ideological Scapegoat? 101. Cambridge: Cambridge Scholars Publishing, 2018.

security.¹⁸⁶ The priorities of the U.S. government on various instances of attempting to build the wall can be seen as the efforts that have evidently violated various aspects of the civil liberties for the individuals with the key goals of attaining the national security.

President Trump has also been on the forefront in prioritizing the matters of national security as he has reiterated from his support of the “American First” foreign policy. His support has been evidenced by the aspects such as the increasing support for the U.S. military defense spending with decreasing spending on NATO saying that he supports the dedication of the resources towards meeting the domestic needs and matters of national security that would guarantee safety for the American citizens. Trump has also been actively involved in the foreign policy matters with the goals of helping to guarantee elevated levels of national security. Part of his involvement has been aligned to the issues of ISIS and other forms of war such as his decision in April 2017 when he ordered the missile strike against the Syrian airfield as a retaliation for the Khan chemical attack.¹⁸⁷ These can be reviewed as the orders that defy the civil liberties of the individuals in the long run with the goals of prioritizing on the matters of the national security.

7.4 Conclusion

Based on the analysis made in this chapter, the President of the United States is seen to have the legal and Constitutional basis from which to issue the executive orders that will provide directives on the way to run different aspects in the government, but these powers are also reliant on the Acts of Congress. The review made in this chapter has clearly highlighted some of the key executive orders that have had the government prioritize on matters of the national security

¹⁸⁶ Ibid, 111.

¹⁸⁷ Ibid, 121.

over the civil liberties of the individuals, and the reviews made in this paper have been the recent ones starting from the Clinton Era to the Trump era. Throughout the review, the statutes and executive orders that have been issued by the President s during their terms have been seen to prioritize on the importance of national security with little consideration for the civil liberties that are bridged through the process. Even though the U.S. government has been on the forefront in ensuring that its citizens have been well protected, it has been evident that the civil liberties of the individuals tends to be given little considerations when it comes to the aspects of the security legislations.

8.0 Conclusions and Recommendations

8.1 Conclusions

Several conclusions can be drawn from this study. For example, it is logical to conclude that the government has, in numerous historical, contemporary, and legal cases, sided with enhancing national security over the preservation of certain civil liberties when pressured to. Most recently, we see this with the outbreak of COVID-19 where the President and state officials have put heavy restrictions on the U.S. population and directed health organization response efforts under the Defense Production Act of 1950. In an article published by The Washington Post on 16 March 2020, the U.S. government reportedly pressured airlines to provide international travelers' phone numbers and email addresses.¹⁸⁸ The justification behind this action was the ability of the government to "communicate and monitor" passengers that may have been exposed to the virus.¹⁸⁹ While some may view this action as a justified response in the increased urgency of a government response, it clearly crosses into the grey area of 4th Amendment rights violation against those individuals. The commonality between the historical, contemporary, and legal cases is the idea that the country is bigger than any one person, and for this reason, decisions involving national security should be prioritized above the individual's right.

8.2 Recommendations

The second and third order effects behind balancing national security and preserving civil liberties have lasting impacts beyond the current response. It is critical that the government apply heavy scrutiny in every crisis situation to ensure that the balance is maintained, and the default answer does not always sway towards the side of national security. The response to COVID-19

¹⁸⁸ Allie Funk and Isabel Linzer, "How the Coronavirus Could Trigger a Backslide on Freedom Around the World," The Washington Post, March 16, 2020, <https://www.washingtonpost.com/opinions/2020/03/16/how-coronavirus-could-trigger-backslide-freedom-around-world/>

¹⁸⁹ Ibid, Funk and Linzer.

by nations with overpowering governments has further proved how important it is for the U.S. government to find the balance. In China, the government has censored the words “Wuhan + CCP + Crisis + Beijing” and “Supplementary + Western medicine + Coronavirus” from their most popular livestreaming platforms.¹⁹⁰ In Iran, the Middle East’s epicenter of COVID-19, the government blocked Wikipedia and significantly decreased internet activity across the country.¹⁹¹ In Singapore, the government restricted domestic access to the States Times Review’s page on Facebook. While this page continues to publish COVID-19 related content, it has also historically been used to also publish critiques of the Singapore government.¹⁹²

Certain limitation on fundamental freedoms are inevitable in times of crisis. However, with such restrictions imposed by the government comes the necessity to be transparent and proportionate as to not break the values that make America one of the greatest democracies in human history. The countries that continually stifle individual freedom continue to fail their citizens as the trust and relationship between the state and her people grow further apart making any coordinated response in a time of crisis nearly impossible. It is critical that the U.S. government maintain transparency and scale their approach so that the temporary restriction of individual freedoms does not become normalcy.

¹⁹⁰ Ibid, Funk and Linzer.

¹⁹¹ Ibid, Funk and Linzer.

¹⁹² Ibid, Funk and Linzer.

Bibliography

Alihusain, C. *The "US Travel Ban" from an International Law Perspective*. New York: Peace Palace Library, 2017.

ACLU. "National security." Last modified: March 2020, Accessed on March 16, 2020.
<https://www.aclu.org/issues/national-security/detention>

Ball, H. *Bush, the detainees, and the Constitution: the battle over Presidential power in the war on terror*. Lawrence: University Press of Kansas, 2010.

Baldwin, David A. 1997. "The concept of security," *Review of International Studies*, 23,
[https://www.princeton.edu/~dbaldwin/selected%20articles/Baldwin%20\(1997\)%20The%20Concept%20of%20Security.pdf](https://www.princeton.edu/~dbaldwin/selected%20articles/Baldwin%20(1997)%20The%20Concept%20of%20Security.pdf).

Bergen, Peter. *Trump and His Generals: The Cost of Chaos*. Penguin Press, 2019.

Bird, W. *Criminal Dissent: Prosecutions under the Alien and Sedition Acts of 1798*. Cambridge: Harvard University Press, 2020.

Bowyer, K. W. "Face recognition technology: security versus privacy." *IEEE Technology and society magazine* 23, no. 1 (2004): 9-19.

Boyd, T. B. H., and D. Mitchell Jr. "Black male persistence in spite of facing stereotypes in college: a phenomenological exploration." *The Qualitative Report* 23, no. 4 (2018): 893-913.

Bush, George W. *The National Security Strategy of the United States of America*. Morgan James Publishing 2009.

Chemerinsky, E. "The assault on the Constitution: executive power and the war on terrorism."

UC Davis L. Rev. 40 (2006): 1.

Chesney, R., and D. K. Citron. "Deep fakes: a looming challenge for privacy, democracy, and national security." University of Texas Law, Public Law Research Paper No. 629, 2018.

Dahl, R.A. *How Democratic is the American Constitution?: Second Edition*. Connecticut: Yale University Press, 2003.

Davis, A. "Freedom of speech in times of war: the sedition act of 1918." *Social Education* 79, no. 3 (2015): 125-129.

Davis, C. "Innocent until proven guilty: a solution for America's failed military transparency." Roosevelt Institute, Columbia, 2017.

DeVeaux, C. "Rationalizing the Constitution: the military commissions act and the dubious legacy of ex Parte Quirin." *Akron L. Rev.* 42 (2009): 13.

"Developments in the law: the national security interest and civil liberties." *Harvard Law Review* 85, No. 6 (Apr. 1972): 1130-1326.

Emerson, T. I. "National security and civil liberties." *Yale J. World Pub. Ord.* 9 (1982): 78.

Emerson, Thomas I. 1982. "National Security and Civil Liberties". *The Yale Journal of World Public Order* 9(78).

Esposito, L., and Finley, L. *Political Correctness in the Era of Trump: Threat to Freedom or Ideological Scapegoat?* Cambridge: Cambridge Scholars Publishing, 2018.

Etzioni, A. *How Patriotic is the Patriot Act?: Freedom Versus Security in the Age of Terrorism*. London: Routledge, 2005.

Fergie, Dexter. The Strange Career of 'National Security'. *The Atlantic*. September 29, 2019. Accessed on 16 March 2020. <https://www.theatlantic.com/ideas/archive/2019/09/the-strange-career-of-national-security/598048/>

Friedman, Benjamin H. 2011. "Managing Fear: The Politics of Homeland Security." *Political Science Quarterly*, 126(1): 77-106.<https://doi.org/10.1002/j.1538-165X.2011.tb00695.x>

Funk, Allie, and Isabel Linzer. "How the Coronavirus Could Trigger a Backslide on Freedom Around the World." *The Washington Post*, March 16, 2020. <https://www.washingtonpost.com/opinions/2020/03/16/how-coronavirus-could-trigger-backslide-freedom-around-world/>.

Garcia, B. E., and N. Geva. "Security versus liberty in the context of counterterrorism: an experimental approach." *Terrorism and Political Violence* 28, no. 1 (2016): 30-48.

Goldford, D. *The American Constitution and the Debate Over Originalism*. Cambridge: Cambridge University Press, 2005.

Gonzales, A. R. "Legal authorities supporting the activities of the National Security Agency described by the President." US Department of Justice, 2006.

Halperin, T.D. *The Alien and Sedition Acts of 1798: Testing the Constitution*. London: JHU Press, 2016.

- Harn, R.W., and Sunstein, C.R. "A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis." *University of Pennsylvania Law Review*, 2002: 1489-1552. <https://www.jstor.org/stable/3312946>.
- Heymann, Philip B. *Terrorism, Freedom and Security: Winning Without War*. Cambridge, Mass: MIT Press, 2003.
- Hilliard, B. *George W. Bush: Evaluating the President at Midterm*. New York: SUNY Press, 2012.
- Jaffa, Harry V. 1987. What Were the "Original Intentions" of the Framers of the Constitution of the United States? *University of Puget Sound Law Review*, 10(351)
<https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1246&context=sulr>
- Johnson, B. M. "Foreign nationals' privacy interests under US foreign intelligence law." *Tex. Int'l LJ* 51 (2016): 229.
- Johnson, T. *Original Intent and the Framers of the Constitution: A Disputed Question*. New York: Cengage Learning, 2004.
- Johnston, D.C. *Making of Donald Trump, The*. New York: Hardie Grant Publishing, 2018.
- Klarman, M.J. *The Framers' Coup: The Making of the United States Constitution*. Oxford: Oxford University Press, 2016.
- Kurland, P. B. "The Constitution: the framers' intent, the present, and the future." *Louis ULJ* 32 (1987): 17.

- Levy, L.W. *Original Intent and the Framers' Constitution*. New York: Wiley Press, 2000.
- Mazzone, Jason. 2005. "The Security Constitution". *UCLA Law Review*, 53(29), Brooklyn Law School, Legal Studies Paper No. 32. Available at SSRN: <https://ssrn.com/abstract=880076>
- McCaw, C. "A never-ending state of emergency: the danger of national security in emboldening the color line in America." *Miami Race & Soc. Just. L. Rev.* 7 (2017): 323.
- Meleagrou-Hitchens, Alexander. *Incitement: Anwar Al-Awlaki's Western Jihad*. Cambridge, Massachusetts: Harvard University Press, 2020.
- Mick, G. *Framers of the Constitution*. New York: Wiley Press, 2016.
- National Security Agency Central Security Service (NSA/CSS). "Understanding the Threat." Accessed on March 16, 2020. <https://www.nsa.gov/what-we-do/understanding-the-threat/>
- Office of partner engagement: FBI. "Preventing Violent Extremism in Schools". Last modified: January 2016. Accessed on March 15, 2020 <https://info.publicintelligence.net/FBIPreventingExtremismSchools.pdf>
- Powe, L. A. "The role of the court." In *Security v. liberty: conflicts between national security and civil liberties in American history*, edited by D. Farber, 165-88. New York: Russell Sage Foundation, 2008.
- Pushaw Jr., R. J. "Justifying wartime limits on civil rights and liberties." *Chap. L. Rev.* 12 (2008): 675-703.
- Rabban, D. M. "The state of free speech doctrine in 1917." *Ariz. St. LJ* 50 (2018): 911.

Renan, D. "The fourth amendment as administrative governance." *Stan. L. Rev.* 68 (2016): 1039.

Rice, Lewis. "A clear and future danger? Blum explores 'Invisible Threats' in national security and law." *Harvard Law Today*. July 1, 2013. Accessed on March 15, 2020.
<https://today.law.harvard.edu/a-clear-and-future-danger-blum-explores-invisible-threats-in-national-security-and-law/>

Ronczkowski, M. R. *Terrorism and organized hate crime: Intelligence gathering, analysis and investigations*. Boca Raton, FL: CRC press, 2017.

Sampson, F. "Intelligent evidence: using open source intelligence (OSINT) in criminal proceedings." *The Police Journal* 90, no. 1 (2017): 55-69.

Schwartz, B. "Inherent executive power and the steel seizure case: a landmark in American Constitutional law." *Can. B. Rev.* 30 (1952): 466

Scheppler, Bill. *Guantanamo Bay and Military Tribunals: The Detention and Trial of Suspected Terrorists*. New York: Rosen Pub. Group, 2005.

Samuels, Alana. Boston Marathon bombing suspect's lawyers say FBI violated his rights. *Los Angeles Times*, 2014.

Shahzad, S. *Inside Al-Qaeda and the Taliban: Beyond bin Laden and 9/11*. Chicago: Pluto Press, 2011.

Slack, C. *Liberty's First Crisis: Adams, Jefferson, and the Misfits Who Saved Free Speech*. New York: Atlantic Press, 2015.

Smith, Cary S, and Li-Ching Hung. *The Patriot Act: Issues and Controversies*. Springfield, Ill: Charles C. Thomas Publisher, 2010.

Stone, G. R. "National security v. civil liberties." *Calif. L. Rev.* 95 (2007): 2203-12.

Street, P. *Barack Obama and the Future of American Politics*. London: Routledge, 2015.

Suzuki, T., and J. G. Montgomery. "Wandering the web--Exploring information of Japanese Americans' experiences in internment camps during World War II." *Against the Grain* 28, no. 1 (2016): 39.

Tomasky, M. *Bill Clinton: The American Presidents Series: The 42nd President , 1993-2001*. New York: Henry Holt and Company, 2017.

Tyler, Amanda L. *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay*. New York: Oxford University Press, 2017.

Volokh, Eugene. "Liberty, Safety, and Benjamin Franklin." *The Washington Post*, November 11, 2014. <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/11/liberty-safety-and-Benjamin-franklin/>.

Wendy, L. *Japanese American Internment During World War II: A History and Reference Guide*. New York: Wiley Press, 2002.

Whitehead J. W. and S. H. Aden. "Forfeiting enduring freedom for homeland security: A Constitutional analysis of the USA Patriot Act and the Justice Department's anti-terrorism initiatives." *American University Law Review* 51, no.6 (June 2002): 1081-1133.

Winkler, A. "Fatal in theory and strict in fact: an empirical analysis of strict scrutiny in the federal courts." *Vand. L. Rev.* 59 (2006): 793.

Yoo, J. C. “The continuation of politics by other means: the original understanding of war powers.” *Cal. L. Rev.* 84 (1996): 167.

Youngstown Sheet & Tube Co. v. Sawyer. “343 U.S. 579 (1952).” In *This decision found that the President ’s seizure of the steel industry was not justified by his commander in chief authority where Congress had rejected his power to seize.* 2012.

Zick, T. *The First Amendment in the Trump Era* . Oxford: Oxford University Press, 2019.

Biographical Statement

Kristian Hill is a graduate student at Johns Hopkins University, Krieger School of Arts & Sciences. He received his Bachelor's Degree in Defense and Strategic Studies with a focus in Terrorism Studies from the United States Military Academy (West Point) in 2014. He also received his first Masters of Arts Degree from Webster's University in Business and Organizational Security Management in 2018. Kristian is a Captain in the United States Army approaching his sixth year as a Military Police Officer with one deployment to the United States Central Command (USCENTCOM) area of responsibility. His current field placement is the political-military relationship in the United States. He hopes to achieve his Doctorate Degree in Defense Studies where his research interests are in the future of warfare and how the United States will project military power fifty years from today.